TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 166. Mand. 16

JAMES D. PATTON, TRADING AS J. D. PATTON & CO., PLAINTIFF IN ERROR,

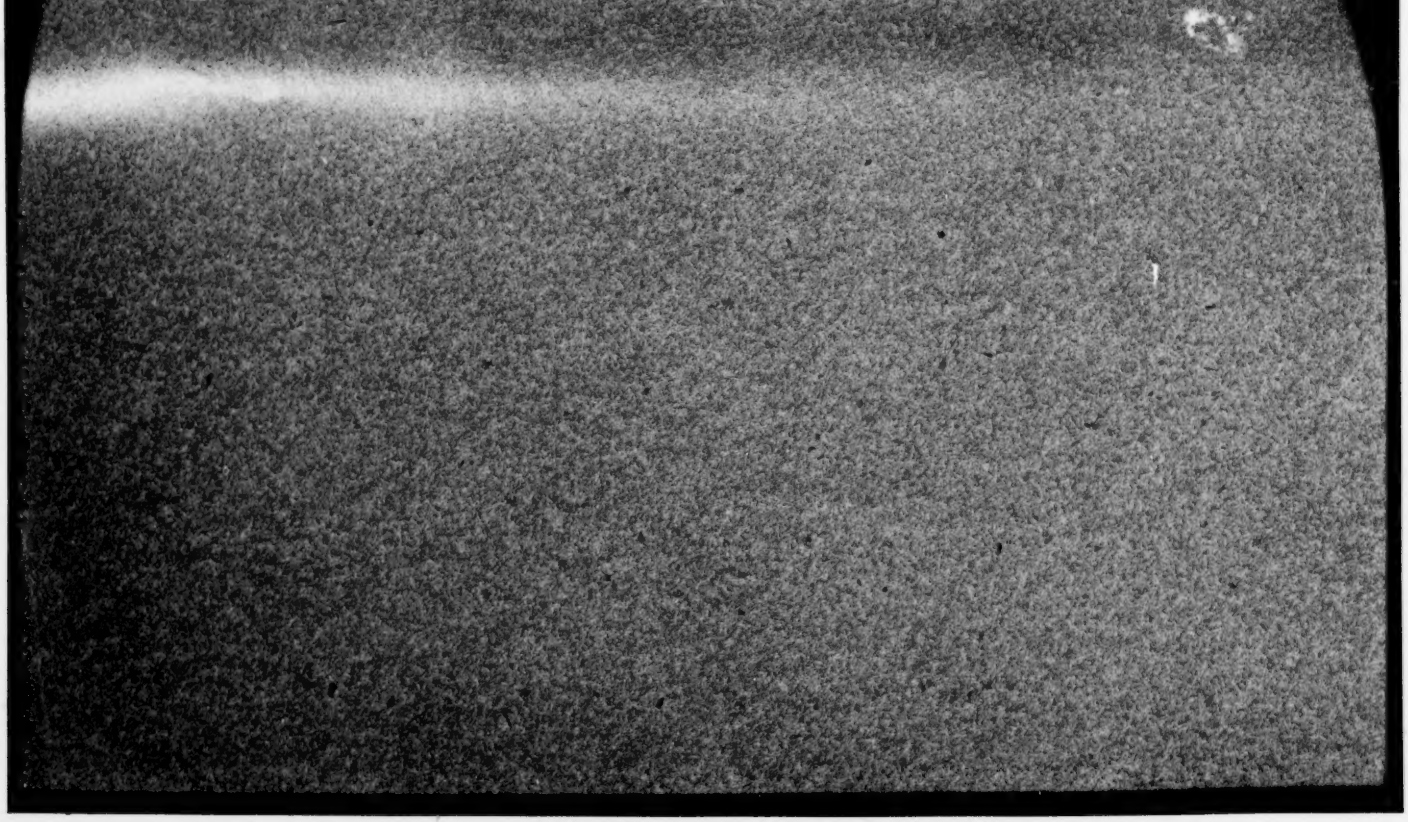
vs.

J. D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED OCTOBER 17, 1899.

(17,540.)



(17,540.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 426.

JAMES D. PATTON, TRADING AS J. D. PATTON & CO., PLAINTIFF IN ERROR,

vs.

J. D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1899.

1 THE UNITED STATES OF AMERICA, } ss:
Eastern District of Virginia, }

At a circuit court of the United States for the eastern district of Virginia, begun and held at the court-house, in the city of Richmond, on the first Monday of April, being the third day of the same month, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable Edmund Waddill, Jr., judge of the eastern district of Virginia.

J. D. PATTON
vs.
J. D. BRADY, Collector of Internal Revenue for the 2nd Dist. of Va. } At Law.

Be it remembered that heretofore, to wit, on the 14th day of July, A. D. 1899, came the plaintiff in the above-entitled action and filed his declaration against the said defendant; which declaration, together with the endorsements thereon, is in the words and figures following, to wit:

Circuit Court of the United States for the Eastern District of Virginia.

J. D. PATTON
vs.
J. D. BRADY, Collector of Internal Revenue for the 2nd Dist. of Va.

2 James D. Patton, a citizen of Virginia and a resident of the city of Richmond, Virginia, who trades and does business in the city of Richmond, Virginia, under the name and style of James D. Patton & Company, complains of James D. Brady, collector as aforesaid, a citizen of Virginia and a resident of Petersburg, Virginia, in a plea that he return to him a large sum of money which he has wrongfully and unlawfully extorted from him, the said James D. Patton, together with damages for his wrongful and unlawful act, for this, to wit:

In the month of May, 1898, plaintiff purchased in the open market, and in the course of regular business, 102,076 pounds of manufactured tobacco. The said tobacco had been regularly prepared for market by the manufacturers thereof, and the same had been placed in boxes, and the manufacturers had purchased from the collector of internal revenue of the United States the stamps which were required by law prior to April 14th, 1898, to be placed upon the same, which stamps had been placed upon the boxes containing said tobacco and had been regularly and duly cancelled subsequent to April 14th, 1898, and the tobacco removed from factory. When plaintiff purchased the said tobacco the entire tax due upon it to the United States Government, under and by virtue

of the laws in existence at the time when the purchase was made, had been paid and the boxes in which the tobacco was placed had on them cancelled stamps that indicated that all such taxes had been paid. Plaintiff purchased the said tobacco because he had a reasonable expectation that the price of it would rise, and
3 he held the same for sale in the hope and expectation that the anticipated rise in its price would bring him a large profit.

After the act of Congress approved June 13th, 1898, entitled "An act to provide ways and means to meet war and other expenditures, and for other purposes," had been enacted, the defendant, James D. Brady, who is the collector of internal revenue for the second district of the State of Virginia, in which he and plaintiff reside, and in the month of June, 1898, demanded of plaintiff that he pay the sum of $3,062.28 as an additional tax to be paid upon said tobacco, which he claimed was imposed upon the same by the second paragraph of the 3rd section of said act. Plaintiff refused to pay the same; whereupon the defendant threatened plaintiff that unless he did pay it he would treat plaintiff as a delinquent, and would seize his property under the provisions of an act of Congress applicable to such case, and would sell the same. Under the coercion of this demand and threat, plaintiff paid the said sum of $3,062.28 to the defendant, but he did so under protest and with notice to the defendant that he would sue him to recover it back.

Plaintiff avers that said section 3 of said act of June 13th, 1898, imposing said additional tax upon his tobacco is repugnant to the Constitution of the United States, and said acts of Congress authorizing the defendant to seize plaintiff's property and sell it if he did not pay the same are also repugnant to said Constitution, and that his suit therefore arises under the Constitution of the United States.

On the 17th day of June, 1899, the plaintiff set out all of
4 the foregoing facts in an application to the Commissioner of Internal Revenue of the United States, according to the laws in that regard and the regulations of the Secretary of the — United States established in pursuance thereof, and he appealed to said Commissioner of Internal Revenue to have said money so unlawfully extorted from him returned to him; but said Commissioner of Internal Revenue on the — day of July, 1899, rejected said appeal and refused to direct said money to be returned to plaintiff. The said Commissioner did not reject said appeal because of any informality in the manner in which it was made, but because he was of opinion that said act of Congress imposing said tax was consistent with the Constitution of the United States, and that said tax was lawfully collected; by all of which acts and doings the plaintiff is damaged six thousand dollars, and therefore he sues.

WM. L. ROYALL, *p. q.*

The foregoing declaration is endorsed as follows:

1899, 2nd July, rules C. O.; 1st August, rules C. O. C. & W. I. Filed July 14th, 1899. M. F. Pleasants, clerk.

5 And on the same day, to wit, on the 14th day of July, 1899, the writ of summons issued from the clerk's office of said circuit court *court* of the United States, and is, together with the marshal's return thereon, as follows, to wit:

6 Circuit Court of the United States of America, Eastern District of Virginia, *ss:*

The President of the United States of America to the marshal of the eastern district of Virginia, Greeting:

We command you that you summon J. D. Brady, collector of internal revenue for the 2nd district of Virginia, if he shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules to be holden at the said clerk's office, in the custom-house, in the city of Richmond, in the district aforesaid, on the third Monday of July, 1899, to answer unto J. D. Patton, trading as J. D. Patton & Co., in a plea of trespass on the case to his damage, as he alleges, of six thousand dollars; and have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the 124th year.

Seal of U. S. Circuit Court, Eastern Dist. of Va.

M. F. PLEASANTS, *Clerk.*

7 Executed this 14 day of July, 1899, by delivering to James D. Brady, collector of internal revenue for the 2nd district of Virginia, the within-named defendant, in person, a true copy of this writ, also a true copy of the declaration.

MORGAN TREAT,
U. S. Marshal, Eastern District of Va.

Marshal's costs, service of writ, $2.00, p'd by plaintiff.

[Endorsed:] Summons. No. 1735. Circuit court of the United States, eastern district of Virginia. James D. Patton *vs.* James D. Brady, col'r, &c. Returnable at rules on the 3d Monday of July, 1899. —— ——, clerk. W. L. Royall, attorney for plaintiff.

8 *Order Dismissing Case.*

In the Circuit Court of the United States for the Eastern District of Virginia.

JAMES D. PATTON, Plaintiff,
vs.
JAMES D. BRADY, Collector of Internal Revenue for the Second District of Virginia, Defendant.

This day came the plaintiff, by his attorney, William L. Royall, and moved the court to take up this case out of its order upon the docket and set a day for the trial thereof.

And thereupon the defendant appeared by Edgar Allan, United States attorney for the eastern district of Virginia, as his attorney, and moved the court, in lieu of settling said case, to dismiss the same because the acts of Congress set out in the declaration are not repugnant to the Constitution of the United States.

Whereupon, on examining the declaration, it appearing that both plaintiff and defendant are citizens of Virginia, and being of opinion that the acts of Congress set out and referred to are constitutional, and there being no further question raised in the pleadings, the court doth order that the motion of the defendant be sustained and the case dismissed, and that the defendant recover of the plaintiff his costs by him expended in and about his defence of this suit.

EDMUND WADDILL, JR., *U. S. Judge.*

September 22nd, 1899.

9 *Petition for Writ of Error.*

Filed October 10th, 1899.

Circuit Court of the United States for the Eastern District of Virginia.

JAMES D. PATTON, Trading as J. D. Patton & Co.,
vs.
J. D. BRADY, Collector of Internal Revenue for Second District of Virginia.

To the honorable justices of the Supreme Court of the United — and the judges of the circuit court of the United States for the eastern district of Virginia:

The petition of James D. Patton respectfully represents that he is aggrieved by a judgment or order of the circuit court of the United States for the eastern district of Virginia, entered on the 22nd day of September, 1899, in the above-entitled cause, as shown by his assignment of errors presented herewith. He therefore prays for a writ of error and for a reversal of the said judgment or order.

JAMES D. PATTON,
By WILLIAM L. ROYALL, *His Att'y.*

10 *Assignment of Errors.*

Filed October 10th, 1899.

Circuit Court of the United States for the Eastern District of Virginia.

JAMES D. PATTON, Trading as J. D. Patton & Co.,
vs.
J. D. BRADY, Collector of Internal Revenue for Second District of Virginia.

James D. Patton, plaintiff and plaintiff in error, assigns as error the following action of the circuit court of the United States, to wit:

The refusal of the court to grant his motion to take his case up out of its order and set a day for the trial thereof and the granting by the court in lieu thereof the motion of the defendant to dismiss his case because the acts of Congress set out in the declaration are not repugnant to the Constitution of the United States, the plaintiff and plaintiff in error insisting that they are repugnant to said Constitution.

JAMES D. PATTON,
By WILLIAM L. ROYALL, *His Att'y.*

11 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between James D. Patton, trading as J. D. Patton & Co., plaintiff, and J. D. Brady, collector of internal revenue for the 2nd district of Virginia, defendant, a manifest error hath happened, to the great damage of the said James D. Patton, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Eastern District of Virginia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States, East. Dist. of Va.

Allowed by—
EDMUND WADDILL, JR.,
United States District Judge, Eastern District of Va.

I, M. F. Pleasants, clerk, hereby certify that a true copy of the above writ of error remains on file in the papers of the cause in my office.

M. F. PLEASANTS, *Clerk.*

12 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To J. D. Brady, collector of internal revenue for the 2nd district of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein James D. Patton, trading as J. D. Patton & Co., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

EDMUND WADDILL, JR.,
United States District Judge, East. Dist. of Va.

Return to Citation.

I hereby acknowledge service of copy of the within citation. October *Oct.* 10th, 1899.

JAS. D. BRADY, *Collector.*

I, M. F. Pleasants, clerk, hereby certify that a true copy of the above citation, with acknowledgment of service, remains on file in the papers of this cause in my office.

M. F. PLEASANTS, *Clerk.*

13 *Appeal Bond.*

Know all men by these presents that we, James D. Patton, as principal, and William L. Royall, as surety, are held and firmly bound unto J. D. Brady, collector of internal revenue for the 2nd district of Virginia, in the full and just sum of five hundred dollars, to be paid to the said J. D. Brady, collector of internal revenue for the 2nd district of Virginia, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a circuit court of the United States for the eastern district of Virginia, in a suit depending in said court between James D. Patton, trading as J. D. Patton & Co., plaintiff, and J. D. Brady, collector of internal revenue for the 2nd district of Virginia,

efendant, a judgment was rendered against the said James D. Patton, and the said James D. Patton having obtained a writ of error nd filed a copy thereof in the clerk's office of the said court to reerse the judgment in the aforesaid suit, and a citation directed to he said J. D. Brady, collector of internal revenue for the 2nd disrict of Virginia, citing and admonishing him to be and appear at Supreme Court of the United States, at Washington, within 30 ays from the date thereof:

Now, the condition of the above obligation is such that if the said ames D. Patton shall prosecute said writ of error to effect and nswer all damages and costs if he fail to make his plea good, then he above obligation to be void; else to remain in full force and irtue.

J. D. PATTON. [SEAL.]
WM. L. ROYALL. [SEAL.]

Sealed and delivered in presence of—
E. A. HOLLAND.

Approved by—
EDMUND WADDILL, JR.,
U. S. Dist. Judge.

I, M. F. Pleasants, clerk of the circuit court of the United States r the eastern district of Virginia, hereby certify that the above is true copy of the appeal bond filed and remaining in the papers of he cause in the said court.

M. F. PLEASANTS, *Clerk*,

4 *Clerk's Certificate.*

NITED STATES OF AMERICA, } ss:
Eastern District of Virginia, }

I, M. F. Pleasants, clerk of the circuit court of the United States and for the district aforesaid, do hereby certify that the foregoing s a true and complete transcript of the record and proceedings in he case lately pending in said circuit court under style of J. D. atton *vs.* J. D. Brady, collector of internal revenue for the second istrict of Virginia, as the same remain on file in my said office.

eal United States Circuit Court, Eastern District of Virginia.

In testimony whereof I have hereto set my hand and affixed the seal of said circuit court, at Richmond, in said district, this 10th day of October, A. D. 1899.

M. F. PLEASANTS,
Clerk U. S. Circuit Court, East. Dist. of Va.

Endorsed on cover: File No., 17,540. E. Virginia C. C. U. S. Term o., 426. James D. Patton, trading as J. D. Patton & Co., plaintiff error, *vs.* J. D. Brady, collector of internal revenue for the 2d disrict of Virginia. Filed October 17th, 1899.

MOTION

16

No. XXXX

Motion to advance.

Filed Nov. 29, 1899.

IN THE

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JAMES D. PATTON, TRADING AS JAMES D. PATTON & CO.,

vs.

JAMES D. BRADY, COLLECTOR OF CUSTOMS, &c.

MOTION TO ADVANCE.

IN THE

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JAMES D. PATTON, Trading as James D. Patton & Co.,

vs.

JAMES D. BRADY, Collector of Customs, &c.

Motion to Advance.

Facts of the Case.

The plaintiff in error is a merchant doing business in the city of Richmond, Va. In the month of May, 1898, he purchased 102,076 pounds of manufactured tobacco in the open market and in the regular course of his business. The tobacco had been regularly prepared for market by the manufacturers and was removed from their factory. The manufacturers had placed upon it the stamps required by the laws then in existence, and the stamps had been duly cancelled after April 14, 1898. The tobacco had therefore paid the whole tax required by the laws then in force, and the tobacco bore the

certificate of the United States that it had paid its tax and was no longer subject to tax.

In the month of June, 1898, the new War Revenue bill was passed (Act of June 13, 1898), the third section of which imposed an additional tax of three cents a pound upon this tobacco in the hands of the plaintiff in error. The defendant in error, who is the collector of internal revenue for the Second District of Virginia, coerced the plaintiff in error into paying this additional tax, amounting to $3,062.28, which he paid under protest, and the plaintiff in error sued him in the Circuit Court of the United States for the Eastern District of Virginia for a recovery of this money, together with damages for his unlawful act. Before bringing his suit the plaintiff applied to the Commissioner of the Revenue for a return of this money, as he is required to do by the Act of Congress, but the Commissioner rejected the application. Plaintiff and defendant are both citizens of Virginia, but plaintiff averred that the Act of Congress imposing this additional tax was repugnant to the Constitution of the United States, and the Acts of Congress requiring defendant to collect the tax were repugnant to said Constitution, and that his case therefore arose under the Constitution of the United States, and was one of which the United States Circuit Court had jurisdiction, notwithstanding the parties were both citizens of the same State.

The cause being regularly placed upon the docket, the plaintiff moved the court to take it up out of its order and set a day for its trial. The defendant antagonized this motion by a motion to dismiss the same, upon the ground that the Acts of Congress set out in the declaration were not repugnant to the Constitution of the United States. As the declaration showed that plaintiff and defendant were both citizens of Virginia, this motion was, in substance, a motion to dismiss the case for want of jurisdiction in the court.

The Court made the following order:

"This day came the plaintiff, by his attorney, William L. Royall, and moved the court to take up this case out of its order upon the docket and set a day for the trial thereof.

And thereupon the defendant appeared by Edgar Allan, United States Attorney, for the Eastern District of Virginia, as his attorney, and moved the court in lieu of settling said case, to dismiss the same, because the Acts of Congress set out in the declaration, are not repugnant to the Constitution of the United States.

Whereupon, on examining the declaration, it appearing that both plaintiff and defendant are citizens of Virginia, and being of opinion that the acts of Congress set out and referred to are constitutional, and there being no further questions raised by the pleadings, the court doth order that the motion of the defendant be sustained and the case dismissed. And that the defendant recover of the plaintiff his costs by him expended in and about his defence of this suit.

EDMUND WADDILL, JR.,
U. S. Judge.

September 22, 1899.

The word jurisdiction is not mentioned in this order, but it is plainly an order that dismisses the case for want of jurisdiction. As both parties are citizens of Virginia, the court could have no jurisdiction of this case, unless the Act of Congress was unconstitutional, and the court being of opinion that the Act was valid, it followed that it had no jurisdiction. The case is therefore within the terms of Rule 32 of this court's practice, and is entitled to be advanced and heard under the provisions of Rule 6 in regard to motions to dismiss. I move, therefore, that the case be advanced. A copy of this motion and of plaintiff in error's brief on the merits was served on the defendant, on the District Attorney of the United States for the Eastern District of Virginia, and upon the Attorney-General of the United States more than three weeks before submitting the motion and also notice of the motion. All of which is proved duly by papers filed with the clerk.

The amount of tax paid under the Act of Congress complained of is only $800.00. That is the amount in controversy therefore, and all that will have to be returned.

WM. L. ROYALL,
for Plaintiff in Error.

If not advanced, statute of limitation may bar all others.

PLAINTIFF'S BRIEF

No. [illegible]

Brf. of Royall for P. E.

Filed Nov. 4 ~~20~~ 21, 1899.

IN THE

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JAMES D. PATTON, Trading as James D. Patton & Co.,

vs.

JAMES D. BRADY, Colllector of Internal Revenue for the Second District of Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JAMES D. PATTON, Trading as James D. Patton & Co.,

vs.

JAMES D. BRADY, Collector of Internal Revenue for the Second District of Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

Facts of the Case.

The plaintiff in error is a merchant and trader in the city of Richmond, and the defendant is the Collector of United States Internal Revenue.

In the month of May, 1898, the plaintiff bought 102,076 pounds of manufactured tobacco, on which all taxes were paid, and which bore on it stamps cancelled after April 14th, 1898, and the same was removed from the factory. He bought it in the regular course of business expecting to make a profit from a rise in the tobacco.

On the 13th of June, 1898, Congress passed the new War Revenue Bill which imposed an additional tax of three cents a pound on this tobacco, and the defendant in error coerced plaintiff in error into paying $3,062.28, the amount of this additional tax. Plaintiff paid it under protest, applied to the Commissioner of the Revenue for the return of it, was refused, and then he brought his suit to recover same in the United States Circuit Court for the Eastern District of Virginia. The court dismissed the suit and this writ of error was sued out.

ASSIGNMENT OF ERROR.

The action of the court in dismissing his suit is assigned as error.

AGREEMENT.

I understand the revenue tax decision, in its last analysis, to mean this:

Every tax that Congress can levy under the Constitution is a direct tax to be apportioned according to population, unless—

1st. It be some sort of indirect tax of which we have so far had no example. (The court said, 157 U. S. R., at page 557, "And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, import, and excises.' Such a tax for more than one hundred years of national existence has, as yet, remained undiscovered, notwithstanding the stress of particular circumstances have invited thorough investigation into sources of revenue." This idea runs through the whole opinion in this volume and also in the next.)

Or 2d. Unless it be an impost, a duty, or an excise, in which case it is to be uniform only, even though it may also be a direct tax.

Assuming this to be the law I shall examine the present case with that as its starting point.

If this assumption is correct then the retroactive part of the 3d section of the act of June 13th, 1898, is clearly repugnant to the Constitution, unless

(a.) It is one of those indirect taxes metioned, or

(b.) Such an impost, duty, or excise, as is contemplated by the Constitution.

I can conceive of no ground upon which it can be said to impose one of the indirect taxes referred to.

It is not an impost. The word impost was used by the framers of the Constitution to describe the taxes laid upon goods imported through the Custom-house.

This tax is clearly therefore not an impost. Nor is it a duty. (Duty same as impost. 7 Wall. 445, &c.) The word duty was used to indicate such taxes as are represented by stamps on papers.

The following is reported by Mr. Madison to have taken place in the Convention on August 16th:

"Mr. L. Martin asked what was meant by the Committee on Detail in the expression 'duties' and 'imposts.' If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.

"Mr. Wilson: Duties are applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties, &c." The Madison Papers, Vol. III., p. 1339.

It is clearly therefore not a duty in its technical sense. But it is plainly an excise (Income-tax Cases, *Nicol* v. *Ames*, 173 U. S. R.); and the question to be considered is, is it such an excise as the Constitution contemplated.

To determine this question we must take this subject up at its beginning.

In the beginning of this investigation it is well to bear in mind the celebrated definition of excise given by Dr. Johnson when making his dictionary. It is as follows:

"A hateful tax levied upon commodities, and adjudged, not by the common judges of property, but wretches hired by those to whom excise is paid."

Sir William Blackstone says also of the excise, when giving an account of it in his Commentaries, Vol. I., p. 320 (Marg.): "But from the original to the present time its very name has been odious to the people of England;" and after mentioning a number of articles that had been added to the list of those "excised," he says of it: "A list which no friend to his country would wish to see farther increased."

The early objections to an excise turned upon its arbitrary character and the arbitrary manner in which it was collected. It was not a tax at all. It was, as its name indicates (excise—cut out of), a scoop into a subject by the law-making power without any reference whatever to the proportional part of the public burdens which that subject should bear. Parliament dipped into a barrel of beer, and took out of it as much as it pleased. It dipped into a box of tobacco, and took out the number of pounds that suited it. It "excised" a subject—cut out of it so much as it wished. Blackwell on Tax Titles (4th Ed.), 1. n 1.

The excise was unknown to the people of England prior to the troubled reign of Charles the First. It existed in Holland, and the people of England had been taught to detest it. When they were agitated by the unlawful exactions of King Charles, a report got out that Parliament was going to impose the "excise," and the Long Parliament promptly denounced heavy penalties against any one publishing such a slander upon Parliament.

Nevertheless, it was the Long Parliament that within two years first imposed an excise upon the English people and it has remained a fixture there from that day to this. The framers of our Constitution adopted it along with the rest of the English system of taxation.

Modern conditions, have of course, greatly modified the early objections to the excise. Nevertheless it is essentially an arbitrary imposition, utterly wanting in all the elements of just taxation and modern thought, and philosophy condemn it as a tax of pernicious tendency and operation. See the subject discussed in the Encyclopedia, Britanica word Excise.

The proposition advanced in this case then, is, that Congress may excise an article as it pleases so that the excise does not amount to spoliation or confiscation. But that having excised it, it has excised it, and the power is exhausted. It cannot excise a second time.

But the property is not therefore to go free of taxation thereafter, because it has been excised. If a man who has paid an excise upon a thousand boxes of tobacco chooses to stack it up in a warehouse and keep it there ten years, the tobacco is not to go tax free because it has borne an excise. It receives the protection of the laws, and it should bear its part of the burdens of the laws. But it is to be taxed thereafter according to the principles of taxation and not according to the arbitrariness of excise. Taxation upon it thereafter is to be direct taxation imposed according to population, which makes it bear a burden that is proportional to that borne by other property.

The court must put some limitations upon this word, and there is a great reason why this construction should be given to the word excise. The government's construction, under which it has imposed a heavy burden upon one of its citizens who bought tobacco upon its assurance that the property had paid all obligations to which it was liable, permits the government to set a trap for the unwary and make them the victims of that confidence in their government which all good citizens should have. It enables the government to delude its citizens into well justified business ventures of which the government will seize the profits when the citizen had supposed he had made a well earned reward. It enables the government to make the citizen speculate and risk his resources for its benefit, where he supposed he was speculating for his own benefit. And though in this case, the government robbed him of only three thousand dollars, the principle would allow it to rob him of three millions of dollars, if the transaction involved any such sum.

The construction contended for safeguards the citizen in his daily pursuits where he might be often entrapped upon the

government's theory. Tobacco is not the only article excised. Indeed, if we are to suppose that all articles excised in England when our Constitution was adopted, may also be excised here, there is hardly any article of ordinary traffic that may not be brought under the excise. The citizen is liable, therefore, to be entrapped upon many articles besides tobacco and spirits. In dealing with articles which bear the government stamps, marked "cancelled," the citizen ought to be considered as in the same class with those who buy negotiable paper. The government should be just as much held estopped to impose additional burdens upon the article, except in the due and orderly course of equal taxation, as the maker of the negotiable instrument is held estopped to set up equities against the bona fide holder without notice. And, at last, what is the government deprived of by such a construction. Of the additional tax upon tobacco which can be hurriedly made up between the proposing of the tax and the enactment of the proposition into law? That ought not to be much, but much or little, it is better the government should lose that much, than that it should be clothed with an arbitrary power to ruin the citizen at its will.

It may be said the person who purchases tax-paid tobacco may add the new tax to the price he asks for his tobacco. But if the principle is to be accepted there is no reason why the additional tax may not, with the old tax be more than the new tax on new tobacco, and the purchaser may, therefore, be compelled to sell at a loss.

Indeed, if the principle is conceded, there is nothing to prevent the government making this second tax whatever it chooses. A citizen might have invested one million of dollars in tax-paid tobacco in May, 1898, and the government might, in June, 1898, have imposed a tax of nine hundred thousand dollars upon it. Confiscated it under the pretense of taxing it after it had paid its tax. This is a most serious power to entrust anywhere.

The facts of this case, outside of the record, however, proves it a good illustration of the oppressive nature of this power as the government claims it.

The tobacco purchased by the plaintiff in error was put up in the form of four plugs—six-inch fours, as the trade calls them—to the pound, and the plugs were to be sold by the retailers for ten cents a plug. The tax could not be added to these plugs, for it would make them sell for more than ten cents a plug, and that kills the sale, as the public insists upon having a ten-cent plug. Therefore, the plugs in all tobacco put up after the new law went into effect were smaller than those involved in this case, but were still sold for ten cents a plug. The public will stand being imposed on to a small extent if it can get plugs for ten cents each rather than pay eleven cents for plugs that contain more tobacco. The additional tax, therefore, practically ruined the sale of the tobacco in this case. It had to be worked off in all sorts of odd ways, the retailer preferring the newly taxed tobacco, though the plugs were smaller, because he could offer them for ten cents a plug.

It is obvious that an arbitrary power of this sort may be used in infinite ways to the injury and oppression of the citizen, and I apprehend, therefore, that the court is not anxious to find out how it actuallly operated in a particular case to the plaintiff's injury. It is enough if the court perceives that it is an arbitrary and irresponsible authority.

There is another most potent reason why the construction contended for should be put upon this word "excise." The whole tendency of modern decisions is towards the proposition that any authority whatever must be exercised in a way that is REASONABLE. This subject has been so fully and so recently discussed before the court in what is known as the Joint Traffic case, that I would not be justified in consuming the court's time by a repetition of the arguments here. I refer on this point to the briefs filed in that case.

In affirming the power of the State's Railroad Commissioner to regulate rates, the court is careful to declare that the regulations shall be reasonable. It is only fair to assume that when the framers of the Constitution authorized Congress to

impose excises, they meant reasonable excises. This view is confirmed by the Constitution of 1780, adopted by the State of Massachusetts. By article IV. of chapter 1 of that Constitution the Legislature is given authority "to impose and levy REASONABLE duties and excises." This was the view of excises entertained by the public at the time the Constitution of the United States was adopted. They were to be reasonable. It must be supposed, therefore, that when the framers of the Constitution authorized Congress to impose excises, they meant reasonable excises, and it is unreasonable for Congress to impose such an excise as this plaintiff in error has been compelled to pay. The truth is, an excise is no tax at all. It is an arbitrary imposition, fixed without rhyme or reason. The framers of the Constitution saw fit to say that Congress might impose this arbitrary burden upon the citizen, but it is not for the court to extend the authority an inch beyond the limits that the framers of the Constitution assigned to it. The view generally entertained of an excise at the time our Constitution was adopted, was that it was a tax that could be made most onerous and oppressive, and was not to be tolerated unless imposed with reason and according to justice. In a debate in the Continental Congress in 1783, Mr. Wilson, of Pennsylvania, said, in describing the sources of revenue to which Congress might resort:

"An excise had been mentioned. In general, this species of taxation was tyrannical and justly obnoxious, but in certain forms had been found consistent with the policy of the freest States. In Massachusetts, a State remarkably jealous of its liberty, an excise was not only admitted before, but continued since, the Revolution. The same was the case with Pennsylvania, also remarkable for its freedom. An excise, if so modified as not to offend the spirit of liberty, may be considered an object of easy and equal revenue." Madison Papers, Vol. I., p. 306.

In a preceding part of this Brief it has been contended that the word "duties" in the Constitution was intended to

describe the taxes imposed upon written or printed instruments by stamps. If that be so, it may be asked why is not the tax on tobacco a "duty" also, since it is collected through the sale of stamps?

The distinction may be this: In the case of tobacco, the tax is imposed directly upon the tobacco, and stamps are used as a medium for collecting the tax only. But in the case of a written instrument the stamp is the tax. A pound of tobacco is not required to have affixed to it a three-cent stamp. It is charged three cents, and those three cents are collected by requiring the owner of the tobacco to buy a stamp, and affix it to the tobacco. But a check is taxed a two-cent stamp.

This distinction may be vague and shadowy, but it seems to have been in the minds of the framers of the Constitution.

At any rate the tax on tobacco is clearly an excise under the decisions of this court (Income-Tax Cases, *Nicol* v. *Ames*, 173 U. S.; *U. S.* v. *Singer*, 15 Wall. 121).

But even if it were a "duty," all the foregoing reasoning would apply to it. For if it is to be considered a "duty," then "duty" is given the same significance as excise. "Duty" will be considered, in that case, an arbitrary tax levied by no principle or rule, but imposed according to the whims and humors of Congress. And if such a tax is to be considered when imposed by the name of excise, it is just as much to be considered when imposed by the name of duty.

Finally, the tax in this case is not taxation at all. It is confiscation. The essential idea of taxation is that all the citizens shall be required to contribute ratably from their possessions for the support of the government. Equality is of the very essence of taxation. But the authority claimed by the government is a power to confiscate.

In one of his most celebrated judgments, Chief Justice Marshall said that the power to tax was the power to destroy, and that celebrated dictum has been as much quoted as any that ever came from his pen. Nevertheless, I insist that it is unsound. The power to tax is not a power to destroy. It is a

power to take a part with which the remainder may be preserved. Taxation may become so oppressive that an individual may be ruined by it, but that is not its objective point. It is always imposed with the idea of preserving and not of destroying. Government undoubtedly possesses the right to destroy. If a citizen's dwelling-house is in the line of a fort's fire, government may destroy the house to send its shot to the enemy's ships. But that is a part of the power of eminent domain, not as that term is technically understood but as it is in its nature, as growing out of the maxim *salus populi suprema lex.*

If thus it became necessary for government to destroy the citizen's property, government may undoubtedly destroy it to save the State. But it does not do it in the way of taxation. It taxes to preserve, it destroys to save the nation's life.

It is a bold as well as a dangerous thing to attack anything whatever that came from the pen of Chief Justice Marshall sitting in judgment in this sacred place. But I am emboldened to this assault because I am able to quote Chief Justice Marshall against Chief Justice Marshall. In the case of *Fletcher* v. *Peck*, 6 Cranch, Chief Justice Marshall said at page 135:

"It may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

None have been found to contest the soundness of this proposition, and it has been repeatedly affirmed in effect by this court.

Loan Association v. *Topeka*, 20 Wall., at p 662.

Parkersburg v. *Brown*, 106 U. S. 487.

Hurtado v. *California*, 110 U. S., at pp. 536–7.

Legal-Tender Cases, 12 Wall.; opinion of Chase, Chief-Justice, at pp. 581-2.

In *Hurtado* v. *California*, 110 U. S., the Court says:

"Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude."

I understand this principle to be canonized by the declarations of this court and the different justices of it from time to time. In the Income-Tax Case Mr. Justice Harlan said:

"If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich because of their wealth, the Court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of *taxation*, but was repugnant to those principles of natural right upon which our free institutions rest, and therefore was legislative SPOLIATION under the guise of taxation."

In the case of *Nicol* v. *Ames*, 173 U. S., the court says at page 615.

"But in order to bring taxation, imposed by a State, or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encoachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax."

This word "spoliation" seems to have been selected advisedly. I understand the court to mean, therefore, that whenever an act of Congress amounts to "spoliation" it will declare it void upon general principles, and as against common right.

If an act can amount to spoliation this one certainly does. The laws had invited the plaintiff in error to buy this tax-paid tobacco upon the assurance held out to him by them that he should have whatever profits he could make by the operation, and yet, as soon as the profit is realized, under the pretence

of taxation, the government comes in and confiscates the profit the plaintiff had made, and diverts it from his pocket to the government's treasury. This is "spoliation" of the most flagrant character.

WM. L. ROYALL,
For Plaintiff in Error.

No. 426

Brf. of Daniel

426

Filed Nov. 21, 1899.

Supreme Court of the United States.

JAMES D. PATTON, TRADING AS JAMES D. PATTON & CO.,

v.

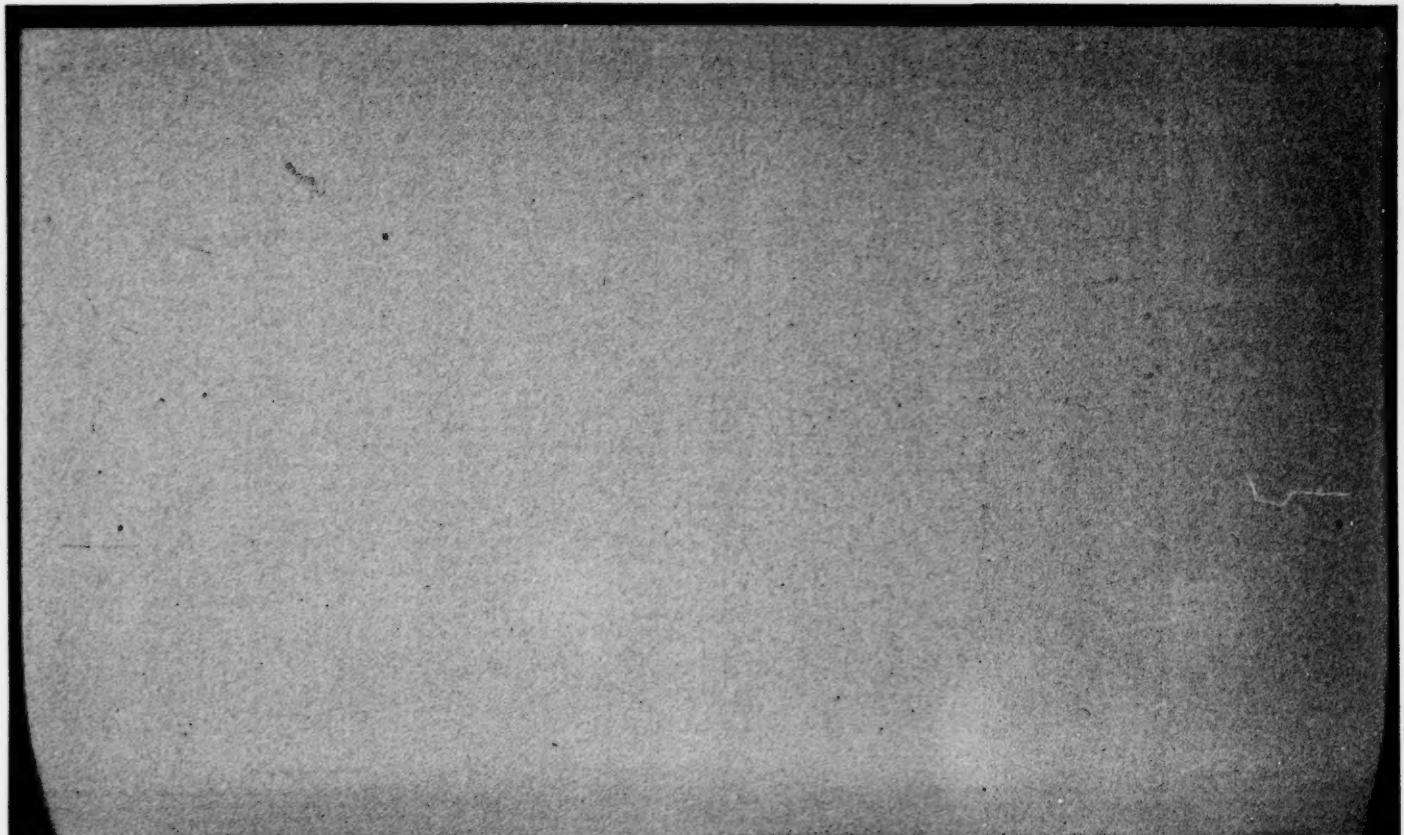
JAMES D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

By JOHN W. DANIEL and FRED. HARPER,
Of Counsel.

J. P. BELL CO., LYNCHBURG, VA.



PROPOSITIONS.

1. The tax of three cents per pound imposed on some tobaccos is a direct, unapportioned, unavoidable tax on the personal property of the owner taxed as such; and is unconstitutional and void.

2. The Act of June 13, 1898, in imposing an additional three cents per pound tax on some tobaccos which had already been taxed through the manufacturer, and tax-paid at the rate of six cents per pound, and not on other tobaccos of the same kind and class as alike taxed and tax-paid at the rate of six cents per pound, created a multiform, and not uniform, tax, varying in degree or rate, being nine cents per pound on some tobaccos, and only six cents per pound on other tobaccos of the same kind, class and legal status.

3. The three cents per pound tax on tobacco is in effect an arbitrary, *ex post facto* penalty, with an appendage of other *ex post facto* penalties for non-payment.

PRINCIPLES.

I. As to Direct Taxes.

1. "The tax on personal property, or on the income thereof, is a direct tax." *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601; *Nicol* v. *Ames*, 173 U. S. 516.

2. "The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct tax."—157 U. S. 580; Fuller, C. J.

3. "A tax on a sale of personal property made at any place is really and practically upon the property."—*Nicol* v. *Ames*, 173 U. S. 521. Peckham, J.

4. "What is property but a fiction, without the beneficial use of it?"—*Alexander Hamilton.*

II. As to Indirect Taxes.

1. "*Uniform.*" Definition as applied to taxation: "Not variant in degree or rate."—*Century Dictionary.*

2. *The article taxed—tax-paid tobacco.* "The tax must be uniform *on the particular article*; and it is uniform within the meaning of the constitutional provision if it is made to bear *the same percentage all over the United States.*"—*Justice Miller's Lectures on the Constitution*, p. 240, 241.

3. *Classification.* "Arbitrary selection can never be justified by calling it classification."—*Gulf, C. & S. R. R.* v. *Ellis*, 165 U. S. 155; Justice Brewer.

III. As to Ex Post Facto Laws.

1. To impose upon the owner of goods a criminal punishment or penalty for not paying an additional tax would subject him to the operation of an *ex post facto* law.—*Burgess* v. *Salmon*, 97 U. S. 381; *Buce* v. *U. S.*, 159 U. S. 78; *U. S.* v. *Iselin*, 87 Fed. R. 194.

2. "The *ex post facto* EFFECT OF A LAW cannot be evaded by giving a civil form to that which is essentially criminal."—*Ibid.*

3. The Law regards facts, not names.—*U. S.* v. *Iselin*, 87 Fed. R. 194.

Supreme Court of the United States.

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JAMES D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.

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BRIEF FOR PLAINTIFF IN ERROR.

By JOHN W. DANIEL and FRED. HARPER,
Of Counsel.

STATEMENT OF THE CASE.

James D. Patton, Esq., a citizen of Richmond, Va., sues in this case to recover from James D. Brady, Esq., the Collector of Internal Revenue of the Second District, the sum of $3,062 28 paid by him to Collector Brady as tax on 102,026 pounds of manufactured tobacco. This tobacco was purchased by Patton from the manufacturer thereof in May, 1898. The tax of six cents per pound, as required by then existing law, had been paid, and the stamps representing the same had been placed on the boxes containing the tobacco, and duly cancelled subsequent to April 14, 1898, and the tobacco removed from the factory. When the plaintiff in error purchased this tobacco in May there was no charge whatever against it. On June 13, 1898, Congress passed an Act entitled "An Act to provide ways and means to meet war expenditures, and for other purposes," and in that Act was a clause imposing an additional tax of three cents per pound on all manufactured tobacco.

(1) "*Manufactured, imported and removed from the factory or custom-house before the passage of the Act,*

(2) *which bore tax stamps affixed to such articles for the payment of the tax thereon, and cancelled subsequent to April 14, 1898, and*

(3) *which articles were at the time of the passage of the Act held and intended for sale by any person.*"

By virtue of this Act all such manufactured tobaccos as were held by any person on the 13th of June, 1898, and intended for sale were charged with a tax of three cents per pound in addition to the tax of six cents per pound already paid. But any person holding manufactured tobacco with the same intent to sell it as Patton entertained with respect to his, was charged with no tax whatsoever, provided the manufacturer thereof had paid the six cents tax imposed by existing law prior to April 14, 1898. PERSONS HOLDING MANUFACTURED TOBACCOS UPON WHICH THE TAX HAD BEEN PAID BETWEEN THE 14TH OF APRIL, 1898, AND 13TH OF JUNE, 1898, WERE THE ONLY PERSONS SUBJECTED TO THIS TAX. Patton paid the tax under protest, and now seeks to recover it upon the ground that it is unconstitutional.

The court below held that the tax was constitutional, and on the motion of the district attorney, who appeared for the United States, dismissed the case. It is claimed by Patton that the tax is unconstitutional in three respects:

1. Because it is a direct tax upon his personal property unapportioned as directed by the Constitution.

2. Because if an excise tax, it is not uniform throughout the United States.

3. Because it is in itself an *ex post facto* penalty with other penalties attached.

I.

HISTORY AND PROVISIONS OF THE ACT OF JUNE 13, 1898.

The history of the Act of June 13, 1898, is disclosed in the *Congressional Record* and in the public proceedings of the Fifty-fifth Congress, second session. It appears that on April 25, 1898, Mr. Dingley introduced the bill, H. R. 10,100, entitled "A Bill to provide ways and means to meet war expenditures." See *Congressional Record*, 55th Congress, 2d session, p. 4263.

This bill provided for the prospective tax of "twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, or removed for consumption or sale," and contained the following clause also:

> "And there shall also be levied and collected, upon all the articles in this section enumerated and described which have been manufactured or imported and removed from the factory or custom-house before the passage of this Act, bearing the tax stamp heretofore required to be affixed to such

articles for the payment of the tax thereon, and which are at the time of the passage of this Act held and intended for sale by any person, *an additional tax equal to the difference between the tax already paid on such articles at the time of removal from the factory or custom-house and the tax hereby levied upon such articles manufactured and removed from the factory or custom-house after the passage of this Act*, namely, a tax of six cents per pound upon all tobacco and snuff, however prepared."

And, with this clause unchanged, it passed the House of Representatives on April 29, 1898. See *Congressional Record*, 55th Congress, 2d session, p. 4460.

Let it be here observed, that if the bill had become a law as it thus originally passed the House of Representatives, there would have been, after the law took effect—

1. A prospective tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, or removed for consumption or sale;
2. A retroactive additional tax "of six cents per pound upon all tobacco and snuff, however prepared;" and
3. The pre-existing tax of six cents per pound, levied by the Act of October 1, 1890, "upon tobacco and snuff manufactured and sold or removed for consumption or use."*

The whole retroactive clause stricken out in the Senate.

But the bill, H. R. 10100, was, on May 2, 1898, referred to the Committee on Finance in the Senate, and on May 12th it was reported by Mr. Allison, with amendments, of which Amendment No. 15 struck out the entire clause levying the retroactive six cents tax per pound on tobacco already manufactured, &c. See

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* The six cents tax per pound, which was in effect prior to the Act of June 13, 1898, was imposed by the following language:

"Upon tobacco and snuff manufactured and sold, or removed for consumption or use, there shall be levied the following taxes:

(Omitting the provisions as to snuff.)

"On all chewing and smoking tobacco, fine-cut and cavendish, plug or twist, cut or granulated, of every description; on tobacco twisted by hand or reduced into a condition to be consumed, or in any other manner than the ordinary method of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened; and on all fine-cut shorts, and upon scraps, clippings, cuttings, and sweepings of tobacco, a tax of six cents per pound."

See Act of October 1, 1890, 26 Statutes, 619, and Internal Revenue Laws, edition of 1894, p. 174, section 3368.

H. R. 10100, Calendar No. 1155 of the Senate, 55th Congress, 2d session, and *Congressional Record*, 55th Congress, 2d session, p. 4850.

The amendment was adopted by the Senate and the retroactive clause stricken out; and the bill passed the Senate as amended on June 4, 1898, by a vote of forty-eight yeas to twenty-eight nays, with only the prospective tax of twelve cents per pound on tobaccos thereafter manufactured. See *Congressional Record*, 55th Congress, 2d session, p. 5541.

Thus tobaccos with tax-paid stamps cancelled thereon, and with which the work of manufacture and sale were done, were left untouched by taxation, and remained in the hands of their owners as any other personal property; and those only were subjected to the tax levied which were yet to be manufactured and sold.

The three cents per pound retroactive direct un-uniform tax emanated from a Conference Committee, and was first proposed publicly June 9, 1898.

The House of Representatives disagreed to the Senate amendments (see *Record*, p. 5542 and 5568), and a Committee of Conference was appointed, consisting of Messrs. Allison, Aldrich and Jones, on the part of the Senate, and Messrs. Dingley, Payne and Bailey on the part of the House of Representatives; and the conferees reported to the House on June 9, 1898 (see *Record*, 55th Congress, 2d session, p. 5713) and to the Senate on June 10, 1898 (*Record*, p. 5732). In their report they recommended as follows with respect to the clause in question:

> "Amendment 12. That the House recede from its disagreement to the amendment of the Senate numbered 12, and agree to the same with an amendment as follows:
>
> In lieu of the words struck out, as follows: And there shall also be assessed and collected with the exceptions hereinafter in this section provided for, upon all the articles enumerated in this section which were manufactured, imported, and removed from factory or custom-house before the passage of this Act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this Act held and intended for sale by any person, a tax equal to one-half the difference between the tax already paid on such articles at the time of removal from the factory or custom-house and the tax levied in this Act upon such articles.
>
> Every person having on the day succeeding the date of the passage of

this Act any of the above described articles on hand for sale in excess of one thousand pounds of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the custom-house through which imported, bearing the rate of tax payable thereon at the time of such removal, shall make a full and true return under oath in duplicate of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to the cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Such returns shall be made and delivered to the collector or deputy collector for the proper internal-revenue district within thirty days after the passage of this Act. One of said returns shall be retained by the collector and the other forwarded to the Commissioner of Internal Revenue, together with the assessment list for the month in which the return is received, and the Commissioner of Internal Revenue shall assess and collect the taxes found to be due, as other taxes not paid by stamps are assessed and collected."

The House agreed to the Conference Report June 9, 1898 (*Record*, p. 5727), and the Senate likewise agreed to it on June 10 (*Record*, p. 5749), and it was approved June 13, 1898.

Macaulay has said that if one respected person claimed that two and two made four, and another insisted that they made six, and if an arbiter were called to determine between them, he would propably decide that, considering the high character of the parties, and all the circumstances of the case, he felt it his duty to say that both were mistaken, *and that in this case two and two made five!*

So it was here. The House wanted a retroactive tax as well as a prospective on all tobaccos of twelve cents per pound, giving credit for six cents per pound already paid.

The Senate wanted no retroactive tax at all, on tobaccos as to which for manufacture and sale the tax was already paid.

The Conference arbiters "split the difference," and thus left in existence an incongruous condition of things—that is to say,

1. A prospective tax of twelve cents per pound "upon all tobacco and snuff, however prepared, manufactured and sold, or removed for consumption or sale."
2. A tax extant of six cents per pound, *already paid*, "upon tobacco and snuff manufactured and sold or removed for consumption or use," and added no tax to such to-

baccos, provided they bore "tax stamps affixed to such articles for the payment of the taxes thereon," prior to or on April 14, 1898.

3. An additional tax of three cents per pound on such tobaccos as were already tax-paid at six cents per pound, provided that these incidents applied to them; that is to say that:

(1) They were "manufactured, imported, and removed from the factory or custom house before the passage of this Act;

(2) Bearing tax stamps affixed and cancelled SUBSEQUENT TO APRIL 14, 1898, and

(3) Were at the time of the passage of the Act held and for sale BY ANY PERSON.

Thus the arbitrary, hap-hazard date, April 14, 1898, some sixty days before the passage of the Act, was pitched on for classifying the articles. It was eleven days before the bill was introduced—that is, before April 25, 1898.

It was fifteen days before it passed the House—that is, April 29, 1898. It was fifty-six days before the Conference Committee reported in the House, and fifty-seven before they reported in the Senate, giving the first public indication that any such abnormal tax was in contemplation. And so it came to pass that "ANY PERSON" having such tobaccos victimized by that fatal day of chance—April 14, 1898—which was, apparently, evolved out of the depths of the perplexity and chance medley of "split the difference" arbitrators, is seized upon and called on to pay this arbitrary, direct, ununiform tax on his personal property, *i. e.*, tobacco—which he had bought in all innocence—tax-paid.

But, at least, we know now that with legislative conference arbitrators six from twelve leaves nine, and that the "split the difference" point of time between June 13, 1898, and the back-door of eternity, over which space is strewed tax-paid tobacco in the hands of "any person," is April 14, 1898. And we have as the practical result the following provisions in the Act of June 13, 1898.

Extract from Act of June 13, 1898.

TOBACCO, CIGARS, CIGARETTES AND SNUFF.

SEC. 3. "That there shall, in lieu of the tax now imposed by law, be levied and collected *a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured, or sold, or removed for consumption or sale;* and upon cigars and cigarettes which shall be manufactured and sold, or removed for consumption or sale, there shall be levied and collected the following taxes, to be paid by the manufacturer thereof, namely, a tax of three dollars and sixty cents per thousand on cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, and of one dollar per thousand on cigars made of tobacco or any substitute therefor, and weighing not more than three pounds per thousand; and a tax of three dollars and sixty cents per thousand on cigarettes made of tobacco or any substitute therefor, and weighing more than three pounds per thousand; and one dollar and fifty cents per thousand on cigarettes made of tobacco or any substitute therefor, and weighing not more than three pounds per thousand: *Provided*, That in lieu of the two, three and four ounce packages of tobacco and snuff now authorized by law, there may be packages thereof containing one and two-thirds ounces, two and one-half ounces, and three and one-third ounces, respectively, and in addition to packages now authorized by law, there may be packages containing one ounce of smoking tobacco.

And there shall also be assessed and collected with the exception hereinafter in this section provided for, *upon all the articles enumerated in this section which were manufactured, imported, and removed from factory or custom-house before the passage of this Act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this Act held and intended for sale by any person, a tax equal to one-half the difference between the tax already paid on such articles at the time of removal from the factory or custom-house and the tax levied in this Act upon such articles.*

Every person having on the day succeeding the date of the passage of this Act any of the above described articles on hand for sale *in excess of one thousand pounds of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the custom-house through which imported, bearing the rate of tax payable thereon at the time of such removal*, shall make a full and true return under oath in duplicate of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to the cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Such returns shall be made and delivered to the collector or deputy collector for the proper internal revenue district within thirty days after the passage of this Act. One of said returns shall be retained by the collector and the other forwarded to the Commissioner of Internal Revenue, together with the assessment list for the month in which the return is received, and the Commissioner of In-

ternal Revenue shall assess and collect the taxes found to be due, as other taxes not paid by stamps are assessed and collected.

TOBACCO DEALERS AND MANUFACTURERS.

SEC. 4. That from and after July first, eighteen hundred and ninety-eight, special taxes on tobacco dealers and manufacturers shall be and hereby are imposed annually as follows, the amount of such annual taxes to be computed in all cases on the basis of the annual sales for the preceding fiscal year:

Dealers in leaf tobacco whose annual sales do not exceed fifty thousand pounds shall each pay six dollars. Dealers in leaf tobacco whose annual sales exceed fifty thousand and do not exceed one hundred thousand pounds shall pay twelve dollars, and if their annual sales exceed one hundred thousand pounds shall pay twenty-four dollars.

Dealers in tobacco whose annual sales exceed fifty thousand pounds shall each pay twelve dollars.

Every person whose business it is to sell, or offer for sale, manufactured tobacco, snuff, or cigars shall be regarded as a dealer in tobacco; *Provided*, That no manufacturer of tobacco, snuff, or cigars shall be required to pay a special tax as dealer in manufactured tobacco and cigars for selling his own products at the place of manufacture.

Manufacturers of tobacco whose annual sales do not exceed fifty thousand pounds shall each pay six dollars.

Manufacturers of tobacco whose annual sales exceed fifty thousand and do not exceed one hundred thousand pounds shall each pay twelve dollars.

Manufacturers of tobacco whose annual sales exceed one hundred thousand pounds shall each pay twenty-four dollars.

Manufacturers of cigars whose annual sales do not exceed one hundred thousand cigars shall each pay six dollars.

Manufacturers of cigars whose annual sales exceed one hundred thousand and do not exceed two hundred thousand cigars shall each pay twelve dollars.

Manufacturers of cigars whose annual sales exceed two hundred thousand cigars shall each pay twenty-four dollars.

And every person who carries on any business or occupation for which special taxes are imposed by this Act, without having paid the special tax herein provided, shall, besides being liable to the payment of such special tax, be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than five hundred dollars, or be imprisoned not more than six months, or both, at the discretion of the court."

The concluding section of the Act is as follows:

SEC. 51. "That this Act shall take effect on the day next succeeding the date of its passage except as otherwise specially provided for."

And it is authenticated as "approved June 13, 1898."

II.

THE TAX OF THREE CENTS PER POUND ON TOBACCO IS AN UNAPPORTIONED DIRECT TAX ON PERSONAL PROPERTY.

It had been long considered in this court, prior to the income tax decisions, that "direct taxes within the meaning of the Constitution are only capitation taxes, as expressed in that instrument, and taxes on real estate." (See *Springer* v. *U. S.*, 102 U. S. 586, 602, and Ch. J. Fuller's opinion in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 579.)

This conclusion of the court was reviewed and reversed in the income tax case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1894), where it was held:

1. That a tax on land is a direct tax, and that
2. A tax on the rents or income of real estate is also a direct tax.

Upon the rehearing of the case, as reported, in 158 U. S. (1895), it was further held:

1. That a tax on personal property is a direct tax, and
2. That a tax on the income of personal property is also a direct tax; and that all such direct taxes are unconstitutional and void, unless apportioned according to representation.

And so it is now regarded as settled doctrine in this tribunal that "the tax on personal property or on the income thereof is a direct tax." *Nicol* v. *Ames*, 173 U. S., Peckham, J.

Accepting the construction of the Constitution as thus enunciated by this court, we have the questions presented to us:

1. Is this tax on Patton's tobacco a direct or an indirect tax?
2. If a direct tax, is it apportioned?

It is undeniably and patently "unapportioned."

Is it direct? Patently so.

There are many illustrations of indirect taxation in the Act before us of June 14, 1898; and there are many ways of levying indirect taxes on tobacco.

There may be an indirect tax on it through the medium of a

license on the manufacturer of it in its various forms of consumption, as twists, plugs, smoking, cigars, cigarettes, snuff, and whether in hogsheads, boxes, or otherwise.

There may be an indirect tax on its sale by the manufacturer; or on its sale by the dealer who buys and sells it; or on the use of stock exchange facilities for its sale; or on its sale at auction; or on its sale by a *del credere* commission or other agency. In any one of these ways tobacco has often been and may be indirectly taxed. But simply as tobacco in the hands of its owner who cannot "own" it, without the right to sell it, which is a part of ownership, we are not aware that it has ever been taxed before by the United States. And it is self-evident that it is, by this three cents per pound, taxed in the hands of its owner by reason of that ownership, and that the tax is direct "on the tobacco," dry so, as such. There is no other way of levying a direct tax on tobacco, save by using just such words as are used in the tax Act, and there can be no doubt that Congress intended to do what it has done, levied the tax *on the tobacco*, by words which move in a direct line from the power that lays the tax to that article of personal property on which it is laid, *i. e.*, tobacco.

The tax is not on the manufacture. The manufacture had been completed and paid for by the anterior six cents tax.

The tax is not on the sale of the manufactured article as connected with the manufacture. That, too, had long since been completed and the tax paid.

The tax is not on the tobacco dealer. He is elsewhere classified and required to pay a special tax.

The tax is not on any privilege whatsoever exercised by Patton with respect to time, place or manner of dealing with it.

The tax is not on any facility furnished or to be provided by any stock exchange or other agency.

The tax is not on any business. It is on the private citizen owner.

The tax is not on consumption. If the owner intends the tobacco for consumption he is wholly exempted, and not retaxed at all.

The tax is not on the sale of the tobacco at a particular place.

The tax is not on the sale of the tobacco at all, whether by Patton or any other owner. It might never be sold, yet it would be taxed

if at the time of the passage of the Act it was held "with intent to sell." The owner might sell it after the passage of the Act and yet not be taxed, provided that "at the time of the passage of the Act" he intended to consume it, to give it away, or do anything else with it but sell it.

The incidence of the tax is directly on Patton as owner of the tobacco. It is "imposed merely because of ownership." (158 U. S. 627.)

It fulfills the definitions of "direct tax" in each and every particular. If there can be a direct tax on tobacco this is that tax. Its primary and ultimate incidence as well is on Patton. He could not avoid it by anticipation, for it had no prospective relation. He could not escape it by any manner of device after it was laid. (158 U. S. 627–628.) And the very gist of direct tax is here as in the income tax cases, for as therein said: "*A tax upon property holders in respect of their estates, whether real or personal, or on the income yielded by such estates,* AND THE PAYMENT OF WHICH CANNOT BE AVOIDED, *are direct taxes.*" (158 U. S. 558.)

Patton's momentary intent to sell the tobacco, existing, not *before* nor *after* the passage of the Act, but *eo instanti* "*at the time of the passage of the Act,*" is added to his ownership by the words of the Act; but it cannot be added to ownership. It is a part of it. It is a spurious and inefficient "plus 0" phrase, since the right of the intent to sell inheres in the idea of ownership just as the right to use an income inheres in the right to possess it. Property right includes the right of disposition, *or rather that is itself the definition* of property. "What, in fact, is property but a fiction without the beneficial use of it," said Alexander Hamilton.

Patton had himself practically and efficiently paid the six cents per pound tax which had been saved from being a direct tax by the fact that, though it was collected by the manufacturer who sold the tobacco, he put the burden so borne by him on the purchaser, and thus according to the theory of indirect tax, sent it flying off as a ricochet shot from the original tax payer.

All indirection had ended in dealing with this tobacco by the government. Manufacture and sale had been paid for; dealers in the article and those exercising special privileges, or using special

facilities, were otherwise taxed, and the United States had closed the book of its accounts and transactions in the matter. But now comes Congress again swooping down on the same tobacco in the hands of him who had become the owner through a perfected and paid-for sale, and saying to that owner, "pay the United States directly three cents per pound more on that tax-paid tobacco of yours, but we will not tax others on similar tax-paid tobaccos of the same lot if the manufacturer paid the six cents tax on it prior to April 14, 1898." It says this to him after he has reimbursed the manufacturer on account of the six cents which was originally paid by him, in the enhanced price which he has paid for the goods. This is practically the nature of the transaction, according to the theories by which political economists and jurists differentiate direct from indirect taxation.

In *Nicol* v. *Ames*, 173 U. S. 509, 516, a tax levied by Congress on sales or agreements to sell "any products or merchandise at any exchange, or board of trade, or other similar places, either for present or future delivery," was contended as a direct, unapportioned tax. Clearly in the opinion of this court, which is convincing in its exposition of the matter, the tax was not "direct" on the property or person of the owner of the products, or merchandise sold at the exchange, board of trade, or other similar places, but upon the privilege, opportunity or facility there offered. And the following excerpts from the luminous opinion of Justice Peckham show with precision the line of demarkation between such taxation on sales at exchanges and similar places, and the mere private sales by the owner of his own property.

The Justice said:

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy" (p. 516).
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> * * * * * * * *
>
> "We think the tax is, in effect, a duty or excise laid upon the privilege opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members

of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct" (p. 519).

* * * * * * * *

"It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax to some one else. This, however, assumes that the tax is not in the nature of a duty or an excise, but that it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of the sale thereof, *nor upon the sale itself considered separate and apart from the place and the circumstances of the sale*" (p. 520).

Then, having thus shown that the tax under advisement was not a direct tax, he turned to show where the power of excise, and the indirection, would end, using this language:

"A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. THE LATTER TAX IS REALLY AND PRACTICALLY UPON PROPERTY. It takes no notice of any kind of privilege or locality, and the fact of a sale is alone regarded. Although not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. *A sale at an exchange differs from a sale made at a man's private office, or on his farm, or by a partnership, because,* although the subject-matter of the sale may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters, which are more easily obtained there than at an office or upon a farm. To accomplish a sale at one's farm or house or office might, and probably would, occupy a great deal of time in finding a customer, bringing him to the spot and agreeing on a price. All this can be done at an exchange in the very shortest time and at the least inconvenience. The market is there, and all that is necessary is to send the commodity. Although a sale is the result in each case and the thing sold may be of the same kind, the difference exists in the means and facilities for accomplishing such sale, and those means and facilities there is no reason for saying may not be taxed, unless all sales are taxed, whether the facilities be used or not" (p. 521).

The gist of this decision lies in these lines above quoted:

> "*A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place.* THE LATTER TAX IS REALLY AND PRACTICALLY UPON PROPERTY. IT TAKES NO NOTICE OF ANY KIND OF PRIVILEGE OR FACILITY, AND THE FACT OF A SALE IS ALONE REGARDED" (p. 521).

Rem acu tetigisti.

There is the acute and supreme test of the nature of the tax. If the tax on the property described made "in any place," it is a direct tax, and, unless apportioned, unconstitutional and void.

That is just this case.

Patton's tobacco on his hands is taxed by the Act of June 13, 1898, by a narrow and arbitrary description thereof that is void of the characteristics of any natural or philosophical, and is scarcely of intelligible, significance.

It is taxed by being embraced in the words "held and intended for sale *by any person*"—himself or another—intending to sell it "at any place," and at any time whatsoever. The sale is the substance. The greater contains the less. The intent to sell, variable and flitting, is the tremulous and uncertain foreshadowing thereof.

And the tax is laid on it directly with just this light shadow of "intent" playing over it—taking "*no notice of any kind of privilege or facility, and the fact of intent to sell being alone regarded.*"

If this be not a direct tax, then *Nicol* v. *Ames* and the income tax decisions go for nought, and it is chaos come again to the constitutional jurisprudence of Federal taxation. But the line drawn in *Nicol* v. *Ames* is like "a shaft of light across the land." And it is to be hoped, for the stability of law, and the mighty interests that rest upon law, that it will remain there—a very lighthouse to the commercial mariner and to the student of the Constitution.

The double interdict of direct taxes in the Constitution.

It must never be forgotten that of all things prohibited by the Constitution "direct taxes" was the only thing twice prohibited. The power given to Congress to levy taxes stands by itself without limitation, save that of unifomity in all "duties, imposts and ex-

cises throughout the United States." But on either side of this power granted, in Art. I, sec. 8, clause 1, stands a sentinel, the one commanding in Art. I, sec. 2, clause 3, that—

> "Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers," etc.

And the other commanding, in Art. I, sec. 9, clause 4, that—

> "No capitation OR OTHER DIRECT TAX shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken."

These commands are the "thou shalt" and the "thou shalt not" of the Constitution spoken to Congress.

If we marvel that in an instrument so concise and so nicely chiselled, the founders and ordainers of the Constitution gave double command that direct taxes be apportioned and tied them together inseparably with representation, we must at the same time realize how deeply they felt the necessity of the principle to the peace and contentment of the country, and how anxious they were to make its impression ineradicable.

They were thus particular, precise and peremptory in their admonitions, because they were embodying for perpetuity, to use the language of Chief Justice Fuller:

> "One of the great compromises of the Constitution resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystalizing it in such form as to allay jealousies in respect to the future balance of power; to reconcile conflicting views in respect to the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the States, regard should be had to their RELATIVE WEALTH, since those who were to be most heavily taxed ought to have a proportionate influence in the government." *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 564.

Truly is it thus pointed out that the enumeration and taxation of the slaves was but one element that entered into the compromise of the Constitution with respect to direct taxation.

Relative wealth of the country the touchstone of the constitutional compromise.

The touchstone of the compromise was "*the relative wealth*" of the States, whether in slaves, lands, moneys, products or other things. "Relative wealth" was the genus, slaves only a species. And the wealth of the country, whether in one State or another,

and whether it be represented by incomes, bonds and stocks in the commercial centres; by finished products in the manufacturing regions; by lands and lots in populous communities or in rural districts; or in the products of waters in the fisheries; or in the products of agriculture, is always the client that appears to hold down the taxing power within the lines of the Constitution, and to see to it that it does not override the principle of apportionment in levying direct taxes.

The large, profound, and far-reaching considerations of permanent public policy which entered into the minds of the statesmen who framed the Constitution, and through them entered into its language, must enter also into its juridical construction and enforcement. Tobacco, like incomes, is a part of "the relative wealth of the country"—very large in some communities, very small in others—and to tax *it* directly (not its manufacturer nor its sale as a business) without apportionment, is to heap the burden of the tax heavily upon some communities, and upon some individuals, and with very disproportionate lightness on other communities and on other individuals. And it is to arouse, naturally, that very jealousy of section which the Constitution framers were so anxious to allay and suppress—that jealousy which broke out so fiercely in resistance to the income tax, upon which, with all its diversities of partial, multiform and arbitrary incidence, this tobacco tax seems to have been modelled. The income tax applied only to incomes over $4,000, and the tobacco tax applies only to tobacco in excess of one thousand pounds, and, worse than that, to no tobacco of the same category on which the stamps were cancelled on or before April 14, 1898. The income tax was a direct tax on personal property. The tobacco tax is a direct tax on personal property. The income tax was imposed "merely because of ownership"; and this tax is imposed "merely because of ownership." The income tax was without avoidance or escape; and this tax is without avoidance or escape.

In the income tax case the Chief Justice drew an apt and impressive illustration of its injustice by citing "the products of the farm" as brought within the pale of any doctrine that would support it. And in this case the tax falls on "a product of the farm"—manufactured, it is true—but the tax is not on the manufacturer, for that has been paid.

And so there can arise no case in which applies more pertinently the reminder of the Chief Justice, in his opinion in the income tax case, that—

> "The requirement of the Constitution is that *no direct tax* shall be laid otherwise than by apportionment; the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but IT IS AGAINST ALL DIRECT TAXES." (157 U. S. 580.)

III.

THE "MULTIFORMITY," OR LACK OF "UNIFORMITY," PRODUCED BY AND INHERING IN THE THREE CENTS PER POUND TAX ON TOBACCO.

Congress has undoubted power under the Constitution to lay and collect taxes, duties, imposts and excises in order to pay the debts and provide for the common defence and general welfare, and "the only constitutional restraint upon its power is that (1) *all duties, imposts and excises should be uniform throughout the United States*, and that (2) *no capitation or other direct tax should be laid, unless in proportion to the census or enumeration directed to be taken*, and (3) no tax or duty can be laid on articles exported from any State. As thus guarded the whole power of taxation rests with Congress." Justice Peckham, in *Nicol* v. *Ames*, 173 U. S. 515.

We gainsay not the power of Congress to tax everybody and everything everywhere throughout the United States. But "the commands of the Constitution, in this as well as all respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States." *Nicol* v. *Ames*, 173 U. S. 515.

And whether this particular three cents tax be a "duty, impost or excise," and indirect in its application, or a direct tax seizing straight upon the personal property of the owner, it violates the restraints of the Constitution—the restraint of "uniformity," if it be an excise, etc., and the restraint of apportionment, if it be direct.

Meaning of the terms of the Constitution, "uniform throughout the United States."

The language of the Constitution is:

> "ALL *duties, imposts and excises shall be uniform throughout the United States.*"

There is an element in the very meaning of the word "tax," and of all its species, whether duty, impost or excise, which constrains to equality, for the genus tax finds its appropriate definition in the words:

> "*An enforced* PROPORTIONAL *contribution*, levied on persons, property or income." (Century Dictionary.)

But the still stronger term "uniform" is used in the Constitution. That term emphasizes the due and equable proportion of the tax burden to be embodied in "ALL" duties, imposts and excises "throughout the United States," that is to say, everywhere all over the United States, and as affecting all persons in the United States.

The term "uniform" conveys a complex idea. Nothing can be "uniform" by itself. No man, however dressed, is in "uniform," separately and individually considered. "Uniform" is a term of relation and comparison.

One thing is "uniform" only when compared to some other thing "uniform" with it. One is in uniform only when dressed like another man—each of them governed by one "uniform" rule or model in dress. And when the Constitution commanded that "all duties, imposts and excises shall be uniform throughout the United States," it not only fixed the whole country as the territory of one rule, but all the people of the country who are tax payers, as entitled to the benefit of that one equal and uniform rule.

"Uniform" is defined as "*not varying in degree or rate*"; as "*equable*"; "*homogeneous*"; as "*not different at different times and places*"; as "*of the same form or character with others*"; as "*agreeing with each other*"; "*conforming to one rule or mode.*" (See Century Dictionary.)

The tax on the tobaccos of Patton of the same kind and of the same history as other tax-paid tobacco, is not "uniform" in any of these senses. It does "vary in degree or rate," as to the article, in other hands, the same as Patton's, in every essential characteristic. It is not "equable." It is not "homogeneous." It does differ at "different times," and at "different places," and as to different "persons" of the same legal status. It is not "of the same character with others"—others than Patton and those who bought tobacco with stamps cancelled after April 14, 1898—being

treated "differently" from those who bought before or after him tobaccos on which the stamps were cancelled prior to April 14, 1898. There is no "conforming to one rule or mode," but a variable and inconsistent, inequable, differing, and heterogeneous rule or mode is provided.

Equality the thought of the Nation and the Constitution.

It has been truly and well said by Justice Brewer that—

> "Equality in right, in protection, and in burden is the thought which has run thought the life of this nation and its constitutional enactments from the Declaration of Independence to the present time." *Morgan* v. *Illinois Trust and Savings Bank*, 179 U. S. 301.

And that is precisely the equality that the Constitution meant when it was dealing with the practical subject of taxation, which "comes home to men's business and bosoms." Nothing is certain but death and taxes, it is said; and they must both knock alike, *equa pede*, at the cabin and the palace door.

The States have in representative masses of population their recognition of equality in the taxing clauses of the Constitution, for the direct tax is tied to their representation "by apportionment."

And the individual tax payers of the States everywhere and at all times have their recognition of equality in the declaration that all duties, imposts and excises "shall be uniform throughout the United States." "*Proclaim liberty throughout the land, and to all the inhabitants thereof*," the inscription on the old Liberty Bell of 1776, was finely quoted by Mr. Edmunds, as illustrating this meaning of the Constitution, in 157 U. S., p. 494. The Constitution makers knew its language, and in proclaiming uniformity of duties, imposts and excises in the fundamental law they framed, adopted its sentiment with as searching and all-embracing an application. They, no more than the Liberty Bell, were uttering an empty sound.

"Uniform throughout the United States" not a mere geographical expression, but an expression of principle to be applied to men and things.

The term "uniform throughout the United States" is not a mere geographical expression. "Throughout" is more than "within." It is more searching, and more pervasive. It means

"everywhere in," "all over," and "to each and all in" the United States.

Diplomatically, "the United States" means a government, and only the Government of the United States can be treated with by foreign governments.

Geographically, "the United States" means a certain territory, or domain of land and water, over which "the United States," as a government, has jurisdiction.

Constitutionally and sovereignly speaking, "the United States" means the sovereign people of the United States, who created the Government of the United States to control the territory or domain of the United States and its inhabitants.

"All men are created equal," was the inspiration that created the Government of the United States.

"All men are equal," is the political and juridical fact that it stands for.

And when the Constitution, ordained by "we the people of the United States," said that "ALL duties, imposts *and excises* shall be uniform throughout the United States," it was speaking of the United States as a nation of tax payers, and requiring that ALL their tax burdens of the kind specified should be uniform as to them—each of them and all of them. Uniformity in the burden of tax imposed means equality in the burden bearers.

A tax would not be "uniform" if its burden were heavier on A, who owned a certain piece of property, and lighter on B, who owned another piece of property of exactly the same kind; nor would it be uniform if it taxed A for doing a certain thing with respect to a certain piece of his property and did not tax B for doing the same thing with respect to a like piece of his property.

On the first hearing of the income tax case (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 493 (1894),) the following colloquy took place between Justices Harlan and White and Hon. George E. Edmunds, who was arguing to the court that the income tax was a direct tax, and who was insisting that, if regarded as an excise, it was not "uniform":

> "Mr. Justice Harlan: You don't think the word uniform necessarily implies equality?
>
> "Mr. Edmunds: I do; the dictionary says so. One of its definitions is 'equable.'

"Mr. Justice White: Then the use of both words 'equal' and 'uniform' was mere tautology.

"Mr. Edmunds: Yes. The word 'equal' was in the original draft, and when being revised it was stricken out, not by the committee that was reforming it, *but by the Committee on Style, as tautology*—thus making of this instrument, as I said before, as perfect a model of symmetrical and concrete English as was ever printed in the world. So, I maintain that it is not merely or chiefly a geographical word, but also a word qualifying duties, imposts, excise, thus made equable and homogeneous in respect of the things and the persons to whom they applied, and that the equality shall be everywhere."

Opinions of Justices Field and Miller.

In the view of the court the tax in question, in the income tax case, was direct, and hence void, and it was not necessary for it to pass on this particular point of argument. But it impressed Mr. Justice Field to such a degree that he considered that the lack of uniformity in the exemption clause itself fatally affected the tax. He said:

"One of the learned counsel puts it very clearly when he says that the correct meaning of the provisions requiring duties, imposts and excises to be 'uniform throughout the United States' is, that the law imposing them should 'have an equal and uniform application in every part of the Union." (157 U. S. 595.)

Justice Field, in his opinion, quoted to the like effect the very clear language of Mr. Justice Miller in his Lectures on the Constitution, pp. 240, 241, when he said:

"The tax must be uniform *on the particular article;* and it is uniform, within the meaning of the constitutional provision, if it is made to bear the same percentage all over the United States. That is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the government, in raising its revenues, should not be allowed to discriminate between the articles which it should tax."

In discussing generally the requirement of uniformity found in State constitutions, Justice Miller said that the construction adopted as to the word "uniform" was that "the uniformity must refer to articles of the same class; that is, different articles may be taxed at different amounts, *provided the tax is the same* on the same class everywhere, with all people, *and at all times.*" And Justice Field, quoting this language also, wound up his learned exposition of "uniformity" by this declaration:

"If there were any doubt as to the intention of the States to make the grant of the right to impose indirect taxes, subject to the conditions that such taxes shall be *in all respects uniform and impartial*, that doubt, as said by counsel, should be resolved in the interest of justice in favor of the taxpayer." (167 U. S. 595.)

The discriminations, irregularities and ununiformities in the incidence and amount of the tax.

An inspection of the Act discloses its lack of uniformity in many particulars.

First: It is not uniform as to the persons taxed; for it taxes no holder or owner of tobacco other than manufacturers, save those who happened to have such tobaccos as bore tax stamps affixed and cancelled subsequent to April 14, 1898, and before June 13, 1898. All other persons who might own much more tobacco of exactly the same kind, who might have paid exactly the same money for it, and intended to do the same thing with it, are left untaxed and go scot free.

Second: Indeed, there is a still narrower limit to the number of persons taxed, even though holding tobaccos which they had purchased, which bore stamps cancelled subsequent to April 14, 1898; *for only those are taxed who intended it for sale* at the time of the passage of the Act. They are taxed on that intent, even though they changed it immediately and before the Act went into effect. They are also taxed, even though the tobacco were destroyed by fire and impossible of sale, when the Act went into effect. And if they *intended* to give the tobacco away, or to consume it themselves, they are not taxed at all, even though after the Act went into effect they actually sold it. Is that variable, quivering "intent" with respect to a man's own private property a subject of "excise"? or its predicate?

Third: There is still further differentiation and lack of uniformity in the Act in exempting many, probably the most numerous, owners of tobaccos, identical in history as in kind with that taxed. The list selected for taxation must be those persons, under section 3, *who have on hand for sale manufactured tobacco* IN EXCESS OF 1,000 POUNDS! Those persons who own 1,000 pounds of tobacco are not retaxed at all—no matter when the six cents anterior tax was paid, no matter when the

stamps were cancelled, no matter when the tobacco was removed from the factory. For them absolution! Those, however, who own 1,001 pounds would, as it seems, be taxed on the whole 1,001 pounds. The untaxed persons are simply those who do not own more of tobacco than 1,000 pounds. *He who owns 2,000 or 100,000 pounds is, as it seems, taxed on the whole amount, and is not exempted as to the 1,000 pounds like the fortunate ones who own no more than that amount.* This will be verified by reading section 3, which provides for the assessment and collection of the whole amount of tax due by those who own more than 1,000 pounds of manufactured tobacco upon which the six cents tax had been paid. Were this an exemption of tobacco to the extent of 1,000 pounds, and if no person who owned more were taxed save in respect to the excess of 1,000 pounds, the same principle would apply. The wrong would be of the same character, though not so enormous in degree.

This is not a poor law or homestead exemption, based on the needs of society—on the fact that if householders are stripped of all they have, the care of them must fall on the State. The United States has nothing to do with that kind of legislation, or with the public policies that underlie it. All that Congress can do is to govern all and tax all by one degree or rate of taxation, and to make "*all*" duties, imposts and excises "uniform" as to rich and poor. It has no right to vary its law so as to leave wholly untaxed those who have only 1,000 pounds of tobacco, and put the whole unapportioned and ununiform burden on those who have more. To do this is to hit at wealth just because it is wealth, and it is to draw a line which the Constitution did not draw between those who have much and those who have little; and not even between those who have much property and those who have little property, but between those who have much tobacco and those who have little tobacco, although the man who has the least tobacco may have the most money, and be rich as Crœsus, while the man who has the most tobacco may owe for it, and have no money, and be as poor as a church mouse.

Fourth: If an excise tax on consumption, the burden would fall ununiformly on different owners of like goods. It is evident that tobacco of the same kind, marketed upon the same mercantile conditions and of the same value, would be, after this Act

passed, placed in different relations to consumption and sale, according to what the owners had previously, and legally, done about it. That on which the six cents had been paid before April 14th would compete with that upon which the same tax was paid after April 14th, and the owner of the latter having to pay three cents per pound more tax, on the identical article upon which the owner of the former paid but six, would be handicapped in the sale. If he added the tax of nine cents to the price, he would be outstripped by another who had the burden of adding only six cents to the price per pound. And so great a difference in burden would make the difference between fortune and insolvency to any one largely dealing in the article. In short, the ultimate as well as the primary incidence of this tax falls on the tobacco owner. He cannot escape it. The shot hits him and sticks in him. It cannot ricochet.

Further than this: those who bought the parcels of 1,000 pounds, exempted in many hands, would command the market; and the big pile, made up of many small ones, would undersell and destroy such holders as Patton.

Fifth: If the tax be regarded as an indirect excise tax upon consumption, the lack of uniformity still furthermore inheres in it to the consumer. For the consumer, if charged with the three cents additional tax paid upon Patton's tobacco bought by him, would have to pay more than the consumer of somebody else's tobacco identical with Patton's, save as to that incidental point in its history that its six cent tax was paid prior to April 14, 1898. So that all consumers of the same tobaccos would not pay a uniform tax throughout the United States. If they bought the exempted parcels of 1,000 pounds they would pay none of this tax.

Still more ununiform: if Patton himself consumed his own tobacco, or kept it for his own consumption or use in any way in his business (by disbursing it, for instance, to his employees, or persons contracting with him, as part of their wages or rations), it would not be charged with the three cents tax.

"The intent to sell"—*that* particular conceit of his mind existing at a particular moment, which might vanish in the next moment, which might never be fulfilled, which might become impossible of fulfillment—*that* momentary mental operation of the owner, is made the condition of the three cents tax.

Other persons having the like tobaccos in quality and quantity, and making, it may well be, much more profitable use of their goods, are not taxed. Others who would swear off and repudiate the fatal intent would escape altogether.

Sixth: There is a zig-zag lack of uniformity with respect to the amount of tax levied on the identical article in nature and quality and kind, when held by persons who varied in the period of their acquisition of the article. Thus a person who purchased manufactured tobacco with the six cents tax stamps upon it cancelled prior to April 14, 1898, was by the operation of the Act exempted from paying any tax whatsoever in addition to that the manufacturer had paid on it. Of necessity the terms of the Act exclude from the additional three cents tax that manufactured tobacco which bore cancelled stamps prior to April 14, 1898, and in this wise it exempts those who purchased tax-paid tobacco prior to April 14, 1898. It also exempts from the tax all who purchased tax-paid tobacco subsequent to April 14, 1898, provided the stamp had been put upon it on or before that day, and it had been removed from the factory *before* June 13, 1898.

IV.

THE OPERATION OF THE ACT OF JUNE 13, 1898, ON DIFFERENT PURCHASERS OF SEVERAL LOTS OF TOBACCO PRECISELY THE SAME IN KIND, QUALITY, MANUFACTURE, AND VALUE.

Let us now take, for purposes of illustration, a lot of 14,000 pounds of manufactured tobacco in existence at the time of the passage of the Act of June 13, 1898, and ready to be marketed, and let us follow it as it is bought by different parties at different dates, all of the dates of purchase being prior to the passage of the Act and involved in it by retroactive relation.

Lot 1. Suppose that A buys 2,000 pounds of the tobacco on April 16, 1898; that it had been removed from the factory and the stamps cancelled on April 14, 1898, and that it was on June 13, 1898, the date of the passage of the Act, held by A, and intended for sale. A pays no additional tax, though he buys after April 14th, for the simple reason that the manufacturer had chanced to pay the tax on April 14th.

Lot 2. B buys 2,000 pounds on April 15, 1898, and on that day it was removed from the factory and cancelled stamps affixed, and he, like A, intended it for sale on June 13th. He must pay an additional tax of three cents per pound, though he bought from the manufacturer a day earlier than A, for the arbitrary reason that the manufacturer had chanced to pay the tax subsequent to April 14, 1898.

Lot 3. Let us suppose that C buys, on April 13, 1898, three days earlier than A, and the tobacco was removed from the factory and stamps cancelled on the same day, and he intended it for sale June 13th, when the Act passed. He pays no additional tax, though he bought two days earlier than B and three days earlier than A, because the manufacturer had paid the tax before April 14, 1898.

Lot 4. The fourth lot of 2,000 pounds is bought by D on June 13th, and it is removed from the factory with cancelled stamps affixed on June 13, 1898, and is then held and intended for sale. He pays no three cents additional tax though he buys nearly two months after A, because the tobaccos were not manufactured and removed before the passage of the Act, but simultaneously on the day of its passage, though one day before it went into effect.

Lots 5 and 6. As to lots five and six of 1,000 pounds each, they are bought on April 15, 1898, by E and F, respectively, with cancelled stamps affixed that day, and E and F intended the tobacco for sale on June 13th, the date of the passage of the Act. They pay no additional tax (neither the three cents retroactive tax or the prospective six cents tax) though B, who bought exactly the same quantity of tobacco similar in quality and situation as these two bought (and, indeed, who might have bought the identical tobaccos of E and F) would be taxed as to his holding, while each of them holding separately would be exempt.

Lot No. 7. As to the seventh lot of 2,000 pounds, it is bought by G on April 15th, with cancelled stamps on that day affixed. On June 13th G held it, but had formed no intention of selling it. He was that day reflecting whether or not he would himself make distribution of it to his own employees. Being without the fatal

intention to sell, he is not taxed the additional three cents per pound.

Lot 8. As to the eighth lot of 2,000 pounds, it was bought by H on April 16, 1898, and on that day the tax was paid and the stamps cancelled, but H had left the tobacco stored in the factory of the manufacturer, and it was not removed until June 14th, the very day the Act took effect. It would seem that he does not pay the three cents retroactive tax, because the tobacco was not removed "before the passage of the Act;" that he does have to pay the six cents prospective tax, because the return required to be made for assessment, under section 3 of the Act (see *ante* p. 7) applies to those having tobaccos for sale on the day succeeding the passage of the Act.

We present herewith a table showing this zig-zag operation of the Act:

Table showing the Operation of the Act of June 13, 1898, on Eight Purchasers of Different Lots of Tobacco precisely the same in kind, quality, manufacture, and value.

Purchasers.	*Lots of Tobacco*	*Pounds of Tobacco*	*Date of Purchase by A, B, C, D, E, F, G, and H.*	*Date of Removal from factory and stamp cancellation.*	*How held June 13, 1898*	*Amount of tax on Tobacco.*	*Remarks.*
A	1	2,000	April 16, 1898	April 14, 1898	"Held and intended for sale."	Six cents already paid. A pays no additional tax.	A pays no additional tax, though he bought *after* April 14, because manufacturer had paid tax on April 14.
B	2	2,000	April 15, 1898	April 15, 1898	"Held and intended for sale."	Six cents already paid. B must pay additional tax	B must pay additional tax, though he bought from manufacturer a day earlier than A, because the manufacturer had paid tax subsequent to April 14, 1898.
C	3	2,000	April 13, 1898	April 13, 1898	"Held and intended for sale."	Six cents already paid. C pays no additional tax.	C pays no additional tax, though he purchased two days earlier than B, because manufacturer had paid tax before April 14, 1898.
D	4	2,000	June 13, 1898	June 13, 1898	"Held and intended for sale."	Six cents paid June 13, 1898. D pays no additional tax.	D pays no additional tax, because tobaccos not manufactured and removed *before* the passage of the Act, but simultaneously on the day of its passage, though one day before it went into effect.
E	5	1,000	April 15, 1898	April 15, 1898	"Held and intended for sale."	Six cents paid. E pays no additional tax.	E and F pay no additional tax, though B, who bought exactly the same quantity of tobacco, similar in quality and situation, as they two bought, not in excess of one thousand pounds each.
F	6	1,000	April 15, 1898	April 15, 1898	"Held and intended for sale."	Six cents paid. F pays no additional tax.	
G	7	2,000	April 15, 1898	April 15, 1898	Held, but had formed no intention to sell	Six cents paid. G pays no additional tax.	G, just like B, bought a tax-paid lot on same day as B, but pays no additional tax. Why? Simply because on the day the Act passed he had not formed "the intent" to sell. He was hesitating whether he would distribute it to his employees, give it away, or do something else with it.
H	8	2,000	April 16, 1898	June 14, 1898 removed from facty	Intended to sell, but had left tobacco in factory.	Six cents paid. H pays an additional tax of six cents.	H, like A, bought 2,000 lbs. of tobacco the same day, April 16, 1898, and the tax was then paid and stamps cancelled. But the tobacco was not removed from the factory until 14th June, 1898, the day after the Act took effect, and he must pay six cents more per pound.

V.

THE CLASSIFICATION OF THE TOBACCO FOR TAXATION IS PRETENSED, ARBITRARY, UNNATURAL, UNREASONABLE, UNUNIFORM, AND PARTIAL AS TO PERSON, TIME, AND PLACE.

> "Arbitrary selection can never be justified by calling it classification." *Gulf C. & S. R. R.* v. *Ellis*, 165 U. S. 155. Brewer, J.

No doubt the Congress may classify the persons and articles designed to be taxed. It may tax spirits, and not beer; oleomargarine, and not butter; tobacco, and not oats; the circus, and not the lecture; the lawyer, and not the clergyman; the Pullman cars, and not the street cars; the sugar trust, and not the biscuit trust; the oil companies, and not the milk companies, and so on indefinitely. But it cannot tax the young, and not the old; the black-haired men, and not the red-headed men; the men born April 14th, and not those born some other day; the men who worship Saturday, and not those who worsl ip on Sunday; the men who chance to be in one place, and not those in another place; the goods that happen to be in one place, and not the same goods in other places. In short, it can make no pretensed and merely whimsical, fanciful and capricious classification. It cannot make any arbitrary, any unnatural, any partial, any irregular or any ununiform classification. To do so is to abuse and misuse the term to "classify." The differentiations cannot be immaterial trivialities, or hap-hazard accidents and incidents. Goods must be classified according to their nature, ingredients, qualities and characteristics. A mere artifice of words, a mere arbitrary line of differentiation, a partiality as to time, place or person; an irregular, zig-zag thread of thought run through immaterial circumstances of condition; an unnatural division of things; an unreasonable, factitious rule, instantly confuses and confounds the equitable relation of the tax payer to the tax layer; discriminates between man and man; destroys equality before the law, and breaks up that uniformity of burden which is the concrete genius of the Constitution and of free institutions.

When Patton bought the tobaccos in suit they were already classified by the civil and criminal laws of the United States, and were freely saleable.

When Patton bought the tobaccos which this suit concerns, in May, 1898, they were already reasonably, naturally, uniformly and impartially classified.

There were but two classes of manufactured tobacco in the United States:

1. The tax-paid tobaccos upon which the manufacturer had paid the six cents per pound tax, and which had cancelled stamps.
2. The tax-unpaid tobaccos manufactured having, of course, no cancelled stamps affixed.

Patton was free to buy, remove and sell the first class. They were negotiable. It was a matter wholly indifferent to him *when* the tax was paid. It was paid. That gave him the right to buy it regardless of the "when"; and IT GAVE HIM EQUAL RIGHT WITH THE RIGHT OF ANY OTHER MAN WHO BOUGHT TOBACCOS WITH STAMPS CANCELLED ON OR BEFORE April 14th. The United States had been recompensed; its receipt and guarantee that they were tax-paid were affixed to the goods, and they were discharged to the free market of the country. It was done with them, and it had nothing to do with him, the innocent and assured purchaser.

The second class Patton could not buy. They were not negotiable. They were held in embargo awaiting tax payment and stamp cancellation. They were denounced as unsaleable by the internal revenue laws of the United States, which provide that—

> "Every person who purchases or receives for sale any manufactured tobacco or snuff *which has not been* branded or stamped according to law, shall be liable to a penalty of fifty dollars for each offence." See Internal Revenue Laws of the United States, edition 1894, sec. 3366, p. 174.

Like a good law-abiding citizen, as he was, Patton did not buy the prohibited goods. He bought the paid-up, stamp-cancelled, free, and guaranteed goods, *only to find a few weeks later that he was involved in penalties of the criminal code hurled back at him by ex post facto legislation, and affixed to an irregular and ununiform tax burden so partial and artificial in its operation that it picks him out to receive it, and wholly exonerates others who bought the same kind of tax-paid, stamp-cancelled goods, both before and after he did!*

The scheme of the House Bill 10,100.

The Act "to provide ways and means to meet war expenditures," &c., as it passed the House of Representatives, classified all the tobaccos in the country according to their then existing legal status, and put them in two classes:

1. Those manfactured and sold or removed for consumption or sale after the Act went into effect, and the tax upon them was fixed at twelve cents per pound.
2. Those which were manufactured and removed from the factory or custom-house, bearing the tax stamps affixed, which were, at the time of the passage of the Act, held and intended for sale; and the six cents additional tax was put on them.

The classification put, as nearly as it could, a uniform tax of twelve cents on all the tobaccos in the country held for sale, by crediting those which bore cancelled stamps at that time with the six cents per pound previously paid. (But we shall hereafter see that no retroactive tax can be uniform.)

The "split the difference" amendment of three cents per pound on tobaccos.

Then, by the "split the difference" amendment of the Conference Committee, which we have cited (*ante*, p. 4), which first appeared and was enacted the same day, June 9, 1898, the whole theory of the bill was destroyed, and the tobaccos which were all alike tax-paid, and which belonged to but one class, naturally, legally and historically considered, were re-classed by retroactive relation—

The first sub-class being wholly exempted from any further taxation at all; and

The *second* sub-class being subjected, in the hands of "*any person*," to the three cents per pound tax.

The uniformity of the Constitution fell off the bill when this was done. And the second class of the amendment were driven into a slaughter-pen fenced in between April 14th and June 13, 1898, while the first class was left wholly unscathed. But a loop-hole for escape was left for some of the second class. Some of

them were not subjected to the three cents per pound tax at all, but only those who held tobacco in excess of one thousand pounds. Even amongst the victims were favorites.

VI.

THE ELEMENTS OF DIFFERENTIATION IN THE SUB-CLASSES OF TAX-PAID TOBACCO CREATED BY THE ACT OF JUNE 13, 1898.

First Class—Exempts: All who bought tobaccos on which the six cents per pound were paid and which bore the affixed stamps, cancelled on or before April 14, 1898, are classified and set apart as a privileged class, wholly exempt from the three cents tax—no matter whether the tobaccos remained in the factory or not; no matter whether the owners held them with intent to sell on June 13, 1898, or not

This first class of legisiative favorites, in every point of legal status exactly like Patton, and owning goods side by side with Patton, in every legal and natural respect the same, are retroacted upon a pedestal whose approaches are fortified against the tax-gatherer.

They are quits with the United States, and remain quits. No more assessment for them; no more burden for them; no more annoyance for them; but special favor for them. They bought negotiable goods; the goods are still negotiable; and the happy owners may negotiate them in a free market, *and undersell Patton three cents per pound.*

Practically, and in mercantile effect, if they held 102,026 pounds of tobacco like Patton's they pocketed a trade advantage and profit of $3,062.28, which is imposed as a burden upon him, and swept away from him into the treasury of a Government whose Constitution says be "uniform."

Second Class—Exempts: Then come the owners of tobacco not in excess of 1,000 pounds. No matter how many they are, albeit nine-tenths of the tobacco owners of the country, they are a privileged class; no matter how much tobacco in the aggregate they hold, albeit nine-tenths of the whole bulk of tobacco on the market, no tax for it. They and their holdings are "immune." They are regiments of preferred citizens who wear badges of distinction and favor. No "uniform" of tax for them.

Third Class—Victims: These are hemmed in by fatal dates, arbitrary and partial. They purchased the same tobaccos as the immunes did. Their tobacco was classified as the tobacco of the immunes was classified, and was certified, like theirs, to its proper class as tax paid. But amongst the condemned are favorites—some who draw white balls, and not black balls, in the lottery of the Act of June 13, 1898, and go free, while their companions are sacrificed to be "hewers of wood and drawers of water" to the tax-gatherer. Not all who purchased tobaccos on which the stamps were cancelled subsequent to April 14, 1898, are taxed three cents per pound. Only those whose tobaccos are removed from the factory or custom-house "before the passage of this Act" of June 13, 1898. But no matter when the stamps are cancelled; no matter if the tobacco is not removed from the factory when the Act passes, it is not subjected to the three cents tax per pound, unless the owner holds and intends it for sale "at the time of the passage of the Act."

Fourth Class—Exempts: If the purchaser bought any quantity of tobacco the day before, or any day before, the passage of the Act of June 13, 1898, for consumption, he, the consumer, pays no three cents per pound tax. *This, then, is not by any stretch of imagination a uniform tax on consumption, and in some cases no tax on consumption at all.*

The intent of the owner to sell is no natural or reasonable criterion of classification of the Tobaccos. If it were, it is not uniform on all like owners intending to sell.

A transient attitude of the owner's body has just as much to do with his property, so far as taxation is concerned, as a transient attitude of his mind.

What a man "intends" with respect to his property is a private matter, with which the public has nothing to do, if the intent be legal, *and be not part of the business taxed.* In this case the intent was legal, and the tax is disassociated with any business involving it.

The intent of the owner is collateral to the property, just as ownership is collateral to it.

It is not a classification of the property. Neither is it a classification of the owner. The tobaccos are just the same whether

the owner intends to sell them or not. The right of ownership, of which all legal intents touching the property are parts, is just the same whether the owner intends to sell them or not.

The intent of the owner is not a mark on the goods, nor an item of their description; nor is it a visible mark or description of the owner, in any legal sense, nor a classification of him.

Neither is the owner's intent a subject-matter or a predicate of taxation. *It is not a business* in itself, nor taxed as part of a business; not a privilege; not a facility. It is simply a thought revolving in the orbit of ownership. And thought is free. It cannot be excised or taxed. Nor can it be made the base on which to place the property to be excised or taxed on account of its existence. The state of the weather on April 14th or June 13th may as well have been made the predicate or criterion of taxation of goods as a state of mind of the owner, which is just as variable, far less tangible, more occult, and has just as much to do with the subject-matter in so far as taxation is concerned.

And if the intent to sell the six cent per pound tax-paid tobacco were a classification of those possessing it, the super-imposed three cents tax added to the six cent tax is not uniform, for its incidence is only on those who have such intent with respect to that particular tax-paid tobacco on which the cancelled stamps were affixed after April 14, 1898. To be uniform the incidence of the tax should be on all who then, on June 13th, held, with intent to sell, such tobaccos as Patton's were, *i. e.*, tax-paid tobacco.

The age of the cancellation mark on the stamp is no natural or reasonable classification of the tobacco.

Neither is the age of the cancellation mark on the stamp a natural or reasonable criterion of classification of the goods which are tax-paid.

Age, with respect to persons, may be an element of classification as to suffrage, as to marriage, or as to office; but not so with respect to taxation, before which all ages are equal. *Nicol* v. *Ames*, 173 U. S. 516.

The age of the tobacco was not an element of the classification. But the age of the "cancellation" of the stamps was attempted to be made the criterion of taxation.

A man "who died a Wednesday" of April, 1898, was as much

dead as if he died before the flood. His status was ultimately fixed *then*. And cancellation of the stamps on the tobacco in April, 1898, fixed its status *then* just as completely. It wrote "finis" on the tomb of the tax, and all tobaccos on which the tax stamps were cancelled were just as much of the same class, and as eternally fixed in that class, in the contemplation of equal and uniform law, as are the dead of various dates and generations who rest in a common cemetery.

It was immaterial to the United States when the six cents per pound tax was paid, so that paid it was.

It was immaterial to Patton, the purchaser, when it was paid, so that paid it was.

It was immaterial to tobacco dealers when it was paid, so that paid it was.

It was immaterial to all tobacco purchasers and consumers when it was paid, so that paid it was.

It was immaterial to the value of the tobacco, and to the negotiability of the tobacco, when it was paid, so that paid it was.

It was immaterial to Congress when it was paid, so that paid it was.

And there was no element of materiality in the date of the past and gone stamp cancellation on June 13, 1898, when Congress passed the taxing Act, to anybody anywhere.

But this immaterial incident, *irrelevant* and *aliunde*, is arbitrarily made a standard of classification. As well might Congress have taken the age of the manufacturer of the tobacco, or the age of the revenue officer who affixed the stamps, or the age of the purchaser of the stamped tobacco, or the age of the box which held the tobacco, or the age of the new moon, as to take the age of the cancellation of the stamps on the tax-paid goods as a classification of them or their owners.

And why April 14, 1898?

And how did April 14, 1898, get into the Act as a day of classification of tobaccos, all of which were alike in kind, and all of which were alike in being tax-paid on June 13, 1898? Any other day in the stretch of time between June 13, 1898, running back to July 30, 1868, would have been just as reasonable, just as natural. The only anterior date as to whicl the United States

had concerned themselves with respect to the age of manufactured tobacco was that day, July 30, 1868, as to which the Internal Revenue laws provide that "All manufactured tobacco of every description shall be taken and deemed as having been manufactured after July 30, 1868." See Internal Revenue Laws, edition of 1894, sec. 3378, p. 179.

The Conference Committee and Congress might have picked any one of the ten thousand days lying in retrospection between June 13, 1898, and July 20, 1868, with just as much reason and propriety as it picked April 14, 1898.

It was not guided to that day by any natural, historic, philosophical, or politic consideration. It had no bearing on any stage of the inchoate Act undergoing process of legislation on House Bill 10,100. It was eleven days before that bill made its appearance on April 25, 1898; fifteen days before it passed the House on April 29, 1898; sixty days before the bill passed, June 13, 1898, and fifty-six days before the Conference reported in the House, that is, June 9, 1898, *on which day, for the first time, the three cents per pound ex post facto tax, with April 14, 1898, as the limit of back-action, for the first time made public appearance!* and that very day the House passed the bill.

April 14, 1898 was picked out of the calendar of the past without rhyme or reason, just as a pebble or a shell might be picked up by a strolling idler on the seashore. It had nothing to do with the business of Congress, nor with the business of manufacturer, dealer, purchaser, or consumer of tobacco, and nothing to do with the quality, value or fixed legal status of the goods. It had nothing to do with any actual or conceivable public policy.

It may be that it might have had something to do with the selfish schemes and calculations of outside jobbers who "had speculation in their eyes," and who, after the manner of the "sooner" squatter sovereigns on public lands, had taken time by the forelock, gotten their tobaccos tax-paid and stamp-cancelled before April 14, 1898, and then desired to squeeze out and freeze out of the market competion those who had tobaccos afterwards tax-paid and stamp-cancelled. They would then be three cents per pound ahead of the after-comers and reap a rich harvest from the arbitrary vantage ground thus given them. However April 14, 1898, may be pondered, it is evident that it has no constitu-

tional or legal magic as a classifier of tobaccos to enrich some holders and burden down other holders of the same goods, all of which were alike tax-paid and held with intent of sale on June 13, 1898. And for Congress to reach back sixty days to load some of the same class with taxes and spare others, is an act of designing discrimination or of careless guess-work, or of botched and blundering compromise, either prompted and engineered from without by sinister schemers behind the scenes in the lobby or induced within by the haste and lack of reflection which are unhappily sometimes unavoidable in the pressure of legislation.

Be that as it may, the resultant is a crazy-quilt of tobacco taxation, made of patches of all sizes, shades, textures and colors. And it is evident that "class" and "classify" are words which would be strained beyond any fair and fitting meaning if applied to the various patches of this motley wear.

A distinct class of things, *i. e.*, tax-paid tobaccos—all subjected to a uniform tax of six cents per pound by prior legislation—all bearing cancelled stamps affixed thereto on June 13, 1898—all removed from the factory, and out alike on a free market—all of one kind, one history, and one assured and certified legal status—cannot be retroactively sub-divided into a variety of pieces, cut up into blocks and parcels, big and little, and remodelled into arbitrary, unnatural and partial classes, to the end and effect that some owners of the same natural thing, of the same manufactured thing, and of the same tax-paid and stamp-cancelled thing, shall catch a new burden of taxation, and some shall not.

This is taxing A, and letting B escape taxation, on the same thing.

And Query arises, Why?

Why should purchasers and holders of tobaccos upon which the stamps had been cancelled on or before April 14, 1898, escape any burden put on those who held the like tobaccos on which the stamps had been cancelled the next day, or any other day, subsequent to April 14?

And why should purchasers or holders of tobaccos upon which the stamps had been cancelled subsequent to April 14, 1898, bear any burden not put uniformly on all others whose tobaccos bore stamps cancelled on or before April 14, 1898?

And why should the holder of 2,000 pounds of tobaccos, or of

100,000 pounds of tobaccos, pay a three cents per pound tax on his tobaccos, and the holder of 1,000 pounds pay not a cent of tax on a single pound of his?

No answer drawn from the Constitution can be given. And these questions alone reveal the weakness and indefensibleness of the ununiform and partial tax.

Alike in the goods they held, alike in having fulfilled the law that classified and taxed them, and alike in intent as they stood before Congress on June 13, 1898, they must be treated uniformly alike, or else the act of disparity and ununiformity must fall.

We have no sacred numbers, and no mythology in the Constitution.

VII.

THE AUTHORITIES ON CLASSIFICATION.

In discussing classification we have used, for the most part, the definitive expressions of this and other courts, and shall now be content to refer briefly to the authorities which are distinctively in point.

"Uniform on the particular article," and "same percentage all over the United States."

That the tax must be "*uniform on the particular article*," and "*bear the same percentage on it all over the United States*," was Justice Miller's test (see *ante*, p. 21). By that test this three cents tax is void. It is not "uniform on the particular article"; just the same tobacco as Patton's in every respect being untaxed. And the percentage is not the same on various parcels of the same article anywhere or "throughout the United States."

"In all respects uniform and impartial."

The tax must be "*in all respects uniform and impartial*," is Justice Field's expression (see *ante*, p. 22). The various divergences from uniformity, and the wholesale "partiality" to all who chanced to buy tobaccos on which the stamps were cancelled on or before April 14, 1898, and to all holding not over 1,000 pounds, have been fully shown (*ante*, pp. 22, 32).

Arbitrary selection not classification.

"*Classification cannot be made arbitrarily*," says this court in *Gulf, Colorado & Santa Fe R. R.* v. *Ellis*, 165 U. S. 155. And in that case, speaking of a certain charge of attorney's fees in suits against corporations that did not apply to individuals, Justice Brewer giving the opinion, said, speaking of the State statute which authorized it:

> "It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth."

And again:

> "*Arbitrary selection can never be justified by calling it classification.*"

Is the age of a cancelled stamp any better than the age of a man? And here only those of "*a certain wealth*"—that is, possessing over 1,000 pounds of tobacco, are taxed at all three cents per pound. What could be a more arbitrary selection than April 14, 1898, as a line between tax payers and exempts?

Differentiation must exist "in the nature of things."

In *State* v. *Loomis*, 115 Mo. 307, 314, Black, J., said:

> "The differences which will support class legislation must be such *as in the nature of things furnish* a reasonable basis for separate laws and regulations."

There was nothing in the nature of the tax-paid tobaccos, or in the nature of any other thing respecting it, to furnish a reasonable basis for separate tax laws and regulations, and with criminal penalties attaching, for the purchasers who had gotten it with stamps cancelled *before* and those who got it with stamps cancelled *after* April 14, 1898.

Partiality in a law affecting rights or remedies vitiates it

This is made a test in *Vanzant* v. *Waddill*, 2 Yerger (Tenn.), 260–270, Caton, J. (afterwards Justice of the United States Supreme Court), saying:

> "Every *partial* or private law which directly proposes to *destroy or affect* individual rights, or does the same thing by affording remedies leading to similar results, is unconstitutional and void."

The partiality of this three cents tax has been demonstrated.

Departure from reason or general usage in clear and hostile discriminations against persons and classes vitiates the law.

This is a creterion adopted by Mr. Justice Bradley in *Bells Gap R. R.* v. *Pennsylvania*, 134 U. S. 232, where he declares that classfication for taxation must proceed—

> "Within reasonable limits and general usage."

The three cents retroactive tax has no general usage in our government, and no reasonable basis, to give it any color of sanction. The Internal Revenue Act of 1875 took pains to negate any retroaction.

The cases we have above cited are quoted with approbation in *Gulf, Colorado & Santa Fe R. R.* v. *Ellis*, 165 U. S. 155, and every element of obnoxious, arbitrary, unreasonable, and unnatural inequality and ununiformity that existed in them appears in this case.

We will again refer to retroative classification as affecting the very nature of the so-called tax, and as characterizing it as an "*ex post facto* penalty," but were the act not retrospective these authorities and principles would still condemn it as ununiform and fundamentally wrong and unjust.

The arbitrary exemption again.

The arbitrary nature of the 1,000 pounds exemption we have already referred to, and we quote now as sustaining the view set forth (*ante*, pp. 22 and 23) that it cannot be supported by any analogy drawn from the exemption of household articles from either debt or taxes, the text of Cooley on Taxation, p. 130, where it is shown that such exemptions do not impair the rule of equality and uniformity, for reasons that have no application here.

The learned author says:

> "The exemptions of household furniture, tools of trade, and the limited personal property which very poor persons may be possessed of, are to be looked upon rather as limitations upon the general rule than as exceptions from it; the taxation is only of all that is possessed over and beyond what has been left out as absolutely needful to the owners's support." (Cooley on Taxation, p. 130.)

VIII.

THE RETROACTION OF THE TAX FROM JUNE 14, 1898, TO APRIL 14, 1898—THE THREE CENTS TAX IS WHOLLY RETROACTED.

Law is a rule "*prescribed* by the supreme power," and not a rule retroacted to give new and different effects to the unchangeable and irreversible things that have been done. "*Lex prospicit non respicit.*" The three cents tax per pound was not a tax *prescribed* for the tobaccos, or for any of the things incident to the tobacco upon which it was imposed. It was retroacted upon the past history of the tobaccos and their owners. Every term used to locate the re-tax on the tobaccos is in the past tense. The disfavored and mulcted tobaccos are only those that *had been manufactured;* that *had been removed* from factory or custom-house; that *had been tax-paid;* that *had been stamped;* that *had been stamp-cancelled;* and that *had been held* by the owner with "intent to sell at the time of the passage of the Act."

There is nothing *to be done*, and there is nobody and nothing that is *to be* that the three cents per pound attaches to. The incidence of the tax is wholly on the "*have beens*"—men and things.

The process of retroaction.

Let us follow the process of retroaction. We must look backward to do it. We feel as if reading handwriting reversed and written from right to left, or as reading the negative side through a transparent page. But this is the real practical back-action process of the Act. The tax-power stands at June 13, 1898. Before it is two classes of tobacco:

First. The unmanufactured.

Second. The accumulated stocks of years of manufactured tobaccos, all of which had been held with intent to sell the day before, that is June 13, 1898.

As to the first class, the tax power levies for the future a uniform tax of twelve cents per pound, predicated upon certain conditions.

As to the second class, it levies a three cent per pound tax on *some of it only*, and it pauses, June 14th, ruminating over the

whole stock to pick out what it will tax, and asks the revenue officers questions and receives answers as given, so to speak.

The congressional questions and the revenue officers' answers.

1 Q. "*Are all these tobaccos of the same kind?*"	1 A. "*Yes.*"
2 Q "*Are all the boxes holding them of the* SAME *kind?*"	2 A "*Yes.*"
3 Q. "*Have they all been manufactured* ALIKE?"	3 A. "*Yes.*"
4 Q. "*Have they all* BEEN *taxed alike by Congress at the 'uniform' rate of six cents per pound?*"	4 A. "*Yes.*"
5 Q. "*Have they all* BEEN *tax-paid alike?*"	5 A. "*Yes.*"
6 Q. "*Have they all* BEEN *tax-stamped alike?*"	6 A. "*Yes.*"
7 Q. "*Have they all* BEEN *stamp-cancelled alike?*"	7 A. "*Yes.*"
8 Q. "*Have they all* BEEN *removed from the factory or custom-house alike?*"	8 A. "*Yes.*"
9 Q. "*Have they all* BEEN *held by the owners on yesterday* ALIKE *'with intent to sell?'*"	9 A. "*Yes.*"
10 Q. "*Have the owners more than one thousand pounds apiece?*"	10 A. "*Yes.*"
11 Q. "*Are all the owners of these tobaccos in the* SAME *assured and certified legal status, and have they now the* SAME *and equal rights?*"	11 A. "*Yes.*"

Then Congress asks one more question:

12 Q. "WHEN *were the stamps on the various boxes cancelled?*"

12 A. "*All along at different dates of year, month and day since the Act of October 1, 1890, to this day, levying this six cents per pound tax. Some in 1891, 1892, 1893, 1894, 1895, 1896, 1897, and some in 1898, down to the present day, and some way back prior to October 1, 1890, when a different date prevailed.*"

The congressional edict.

Then said Congress to the revenue officers, so to speak:

"*Go and pick out from those tobaccos which are so much alike that you cannot distinguish them by any natural or artificial differences, either in them or the boxes that hold them, and that are equally undistinguishable by any intent of their owners—go and pick them out by the dates that are on the past-cancelled stamps.*

"*All those that you find with dates on the stamps prior to 1890, or in 1890 after October 1st, or in 1891, 1892, 1893, 1894, 1895, 1896, 1897, or in 1898, up to and inclusive of April 14, 1898—let them all go quit and exempted and free from any more tax.*

"*But pick out, too, all those that have dates on the past-cancelled stamps 'subsequent to April 14, 1898;' and it is hereby enacted that when you have picked them out, they alone shall be retaxed three cents per pound.*

"*But not all of them; don't tax any man's one thousand pounds; tax all that have over one thousand pounds.*

"*Not that these tobaccos are unlike the others; not that their owners have done anything that the other owners did not do—to be taxed; not that their owners propose to do*

anything that the owners of the other tobaccos do not propose to do—to be taxed. But this is my will and pleasure. It is so ordered. Let THESE, *and not* THOSE, *be taxed.*"

"Go, and he goeth." And, as the revenue officers so haply found the dates on the past-cancelled stamps, they taxed the *ex post facto* dates thereof.

"And it came to pass in *those* days that there went out a decree from Cæsar Augustus that *all* the world should be taxed." Luke, chap. 1, verse 1. Our Cæsar is mild. He only bites off a little piece of past-taxed tobacco, and decrees that *it alone* be retroacted on and re-taxed.

The incidence of retroaction is wholly on the past incident.

And thus the incidence of the three cents tax was wholly retroactive upon and fell upon the date of a cancelled stamp—and on no tobaccos or tobacco owners whatsoever, save those whose tobaccos had on them the past-dated cancelled stamps.

A tax retroacted on a past incident is unavoidable and unescapable.

One effect of a retroacted tax is, that it is unavoidable and unescapable. It cannot be avoided by anticipation nor escaped by discretion or evasion.

The past is unchangeable. "What is writ is writ." Omnipotence itself cannot change the past. And here the whole incidence of the tax fixes itself to that irrevocable, irreversible, unchangeable thing, the past and gone day, that had returned from the finite to the infinite mystery of God and eternity.

The stamp may fall off, but the tax is riveted there inseparably.

A retroactive tax on a past incident must, in the nature of things, be "direct."

When a tax is prospective, as all constitutional taxes must be, some element of will power, and some play of faculty, and some possible avenue of avoidance is left the projected or contemplated tax-payer. If the incidence of the tax is on a thing *to be* manufactured, the person proposing the manufacture may decline to consummate it, and escape the tax. If on a future sale, the party

may not sell, and thus escape the tax. But as there can be no possible escape from the existence of a past date, a tax predicated upon it is bound to be direct on the property that *had been* affected by it. And its unavoidability is the conclusive test of its directness, as this court held in 158 U. S. 558. (*Ante*, p. 11.)

A retroactive tax must, in the nature of things, be multiform, not uniform, variant in degree or date.

Observe in this case: that every pound of tobacco that is taxed three cents has the incidence of the tax fastened to it, mixed in the mucilage that fastened the past cancelled stamp. The mucilage may not stay stuck, but the tax does.

Now take the date April 15, 1898, when many stamps were affixed to the tobaccos of many people, and they thus by retroaction from June 14, 1898, marked as a sub-class to be taxed.

What had become of the tobaccos, and what had become of the men whose tobaccos *had been* stamp-cancelled April 15th, when two months had gone by?

The class of tobaccos, and the class of men, may have both disappeared from the earth. Certainly much of the tobacco and many of the men had disappeared.

While a prospective tax is the proportional contribution of the citizen to his country—proportional with others who are in the same class with him, when the incidence of the tax falls on all of the class alike—the essential difference between what *has been* and *what is*, and what *may be*, renders it impossible for the *ex post facto* incidence to fall on all who were of the same class at the date of the incidence—and hence makes it impossible for the retroacted act to be "uniform," or to conform to any rule or principle respecting them or theirs.

All men and things that exist when a prospective tax, speaking forth and not speaking backwards from its enactment, come instantly and equally within its purview. And as more are born, or come into the country, or enter into the conditions that are the foundation of the tax, or as new things are created, or manufactured, or discovered, or imported, of the class kind, they too come instantly into purview and under its operation.

But let a tax operate retrospectively, even for a day gone by, and how many of the class of men and things taxed by the words

of the act have, after being under all the conditions that its ostensible phrase applies to, passed into such a state as to render it impossible of application?

And if the retroaction of the enactment reach back to an old incident sixty days past, how many multiples must there be of the men dead, removed, failed, and of the things consumed, destroyed, perished, which leave only the survivors to bear all the burden which the incident retroactively *would have* distributed upon all alike—could it reach all alike.

As the retroacted tax cannot reach all alike, it cannot tax all alike. And as it cannot possibly tax all classified by the past incident as alike, so it cannot be uniform. By the order of nature, by the process of time, by the inevitable laws of being, uniformity in any kind of exaction that comes under the power "to levy taxes," can only be conceived with respect to living men, extant things, and the incidents of men and things that are *in prospectu*, and not in reminiscence.

How much of the tobaccos which, like Patton's, were stamp-cancelled in May, 1898, existed on June 13, 1898, to be possible subjects of taxation? Who can tell? How much of the tobaccos which on April 15, 1898, were stamp-cancelled, and which are placed thereby under the Act of June 13, 1898, within the terminology of possible operation, remained in the country, or in existence, to come under its actual operation? And if the incidence of a tax can be flung back from June 14th to April 15th, 1898, it is evident that a class of men and things selected for taxation may have vanished utterly long before the tax could reach them, and a mere fragment of the class may have heaped on them a burden which the many *in consimile casu* have necessarily escaped.

A tax cannot be retroacted upon a past incident in the history of person or property sought to be taxed.

The very nature of a tax implies projection; not retrospection, or retroversion.

If a man is to be taxed, he must be a live man; not a dead one.

If a thing is to be taxed, it must be an extant thing, and not a perished thing.

If a business is to be taxed, it must be a business that is *to be* transacted, and not a business that *has been* transacted.

If a privilege is to be taxed, it must be a privilege that is *to be* exercised, and not one that *has been* exercised.

If a facility is to be taxed, it must be a facility that is *to be* used, and not one that *has been* used.

If an intent is taxable, then it must be an intent *to be* formed, and not an intent that *has been* theretofore formed, and possibly reversed before the tax was enacted.

And then this inevitable corollary:

That if a deed, act, or incident be such as is open to the incidence of a tax at all, it must be a deed *to be* done, an act *to be* performed, or an incidence that *is to* happen, and not a deed that has *been done*, or an act that *has been* performed, or an incident that *has* happened.

We are not arguing now whether property which has been once taxed can be again taxed in any case. It is not necessary to contend that this may never be done. A direct *apportioned* tax may more than once involve the same property of a permanent kind. But we are insisting that Congress cannot tax the owner of property and predicate the tax on the fortuitous and casual date of an anterior, consummated and closed incident which once *concerned*, but no longer *concerns*, it, when that date was and is immaterial to the validity of the transaction. And we reach the *reductio ad adsurdum* of the counter proposition when we remember that if Congress can go back one day or sixty days, there is no end or *ultima thule* to stop its retrogressive action, and that it may go on and on back to July 4, 1776, or to Noah's flood, or, indeed, to creation's dawn—as long as man or thing could be found of whom or which historic incident could be made a predicate.

There may be three hundred and twelve classes of tax payers, with different rates of tax on each of them with respect to the like goods in each year, if the date of a past cancelled stamp can classify men and things for taxation.

If A can be separated from B, C, D, E, and F *by ex post facto* relations, and by the mere fact that the stamps on his tobacco were affixed on one past day, and those on C, D, E, and F's

tobacco were affixed on other past days, then the equal rights which they successively acquired are retroactively destroyed.

And if A can be classified for a separate and partial tax by the past day on which a prior tax levied on him was cancelled, then each set of past tax payers, and each set of purchasers from past tax payers, may be put in a particular class as of each successive day on which the stamps were cancelled. Then every past day before the passage of the Act on which tobacco stamps were cancelled, might classify the tax payers and the purchasers of tobacco as of that day.

Then, last year gone by would have three hundred and twelve classes of tax-payers on the same goods, one class for each work-day on which the tax was paid and the stamps cancelled. And the last class might be taxed by a rate of taxation fixed only for the last day to itself; and we might have three hundred and twelve rates of taxation for three hundred and twelve classes of property owners, all of whom bought the identical kind of goods, on all of which a prior tax was paid, and with no difference between them save as to the day on which each did right and acquired equal rights with others.

If a particular block of sixty days can be cut out of a past year and the incidents of that period be taken as classifying goods, then a particular block of sixty hours can be likewise cut out; and if sixty hours, then twenty-four; and if one period of twenty-four hours, then any one period of twenty-four hours; and if any period of twenty-four hours, then all periods of twenty-four hours each for a separate class, with separate taxes, rules and regulations.

And if these periods of sixty days of one past year, or of so many weeks in one past year, or of so many hours in one past year, can be so retroacted upon and made, by back-action, classifiers of goods and men whom they did not classify other than as having paid the taxes assessed upon them in due course, while they were extant periods, extant things, and living men, we may also run back into previous years, and into their separate months, and weeks, and days, and construct upon the dates of their doings retrospective classes and retrospective taxes upon those classes.

And if this be so, all past time, and all the past doings of men, and all the past incidents of history, which no human being can

change or reverse, are at the mercy of the tax-levying power of a particular Congress, which may break up and remould and reclassify all the men who, and things which, were *prospectively classified* by previous Congresses. There is a general resurrection of all things animate and inanimate, and the land and sea give up their dead to be reclassified after a manner to their history and lives unknown, and to be taxed or untaxed, as the discertion, caprice or whim of the tax power may direct.

"Discretion," said Lord Camden, "is the parent of tyranny." If this discretion be in the power of Congress, what a mighty brood of retrospective progeny may it bring forth from the graves and shadows of the past to be mustered anew and retaxed! And what a bonanza the catacombs would be!

IX.

EX POST FACTO PENALTY WITH OTHER EX POST FACTO PENALTIES ATTACHED.

What is actually and practically operative is what we are constantly reminded by the courts to look to. They want no shams and shows, but concrete results. Under whatever sham or show of tax-levying phrase this double retroactive, partial and multiform, so-called tax is cloaked in, plainly enough it is MERE ARBITRARY TRIBUTE WITH EX POST FACTO PENALTY attached. And "the substance and not the form controls." (157 U. S. 581; Fuller, C. J. As April 14, 1898, is basic to the substance of the Act and its tax, so it is the back gate of a statute of limitations retrospectively enacted into the past to shelter all who came before it doing exactly what others did afterwards, to whom no statute of limitations applies, but to them a statute of revivor instead. Not that the latter lacked diligence. They were diligent to the full letter and spirit of the law. Not that they offended anybody. There is no accusation even. But simply that they obeyed the law and paid tax on one day, and their predecessors obeyed the law and paid the tax on another day.

"We obeyed the law and lie here," is the noble epitaph of heroes who fell in battle. It is the epitaph which the sardonic tax power has prepared for victims of the bloody salient that lies between April 14 and June 13, 1898—and April 14 is the basic

end of the salient, basic to Patton's liability, basic to the seizure and confiscation of his tobacco if he refuses to pay the tax, and basic to the interdict against his selling the tobacco without paying the tax, and to the forfeiture of a debt contracted in its sale without paying the tax. (Sec. 3454 Internal Revenue Laws, ed. 1894, p. 233.) And it is basic to the additional penalty upon him of $1,000 if he does anything in violation of the law requiring him to pay this new tribute not otherwise punished. (Sec. 3374 Internal Revenue Laws, ed. 1894, p. 178.)

It is basic in this respect, namely: that the payment of the six cents tax and the cancellation of the stamps after that time exposed Patton and makes him liable to this new cumulative tax, and to the train of penal consequences appended to the new cumulative tax, when in point of fact such payment and such cancellation were, when made, not only legal, but diligent, dutiful, mandatory and exacted under penalties; and when, *furthermore*, all those who bought the same tobaccos on which the tax was paid and the stamps cancelled on or before that basic day, are wholly exonerated from any cumulative tax whatever, and of course from any appendage of penalty.

The true, substantial and effective thing is just this: that the hand of the Act of June 13, 1898, reaches back to April 14, 1898, and builds close up to it as a dividing, retroacted wall a structure of retroactive tax and of *ex post facto* penalty relating to that retroactive tax, all predicated and conditioned upon an act of purchase on the part of Patton, an act of tax payment by a manufacturer of tobacco, and an act of stamp cancellation by a revenue officer—all of the acts, when done, being rightful, dutiful, and some of them mandatory.

X.

THE LEGAL EFFECT OF THE EX POST FACTO PENALTY, AND PRECEDENTS IN POINT.

> *"No bill of attainder or ex post facto law shall be passed."* U. S. Constitution, Art. I, sec. 9, clause 3.

We have shown that even if not otherwise obnoxious the three cents tax in this case is (1) *Direct;* (2) Multiform and variant in rate, and not "*uniform*"; (3) That being a retroacted tax it can-

not be otherwise than *direct;* (4) Nor otherwise than variant and ununiform if in the form of excise.

But "*ex post facto* penalty" is the right name of this exaction, and such is the name this court has given to a much less obvious, and much less unusual, much less partial, and much less unnatural, much less arbitrary, and much less oppressive tax burden. *Burgess* v. *Salmon*, 97 U. S. 381.

This tax enactment fulfills the definition of an *ex post facto* law as—

> (1) "One which *in its operation* makes that criminal or penal which was not so at the time when the action was performed, or which increases the punishment;
>
> (2) Or, in short, which in relation to the offence *or its consequences* alters the situation of a party to his disadvantage." *U. S.* v. *Hall*, 2 Wash. (U. S.) 366. Washington, J.

This Act first makes the incidence of tax penalty attach to stamp cancellation on certain days, and not on other days, when it was innocent and dutiful to cancel them then; and in its consequences it alters the situation of Patton to such degree and to such disadvantage that that situation is made to cost him over $3,000, when the same legal situation and the same tobacco cost others nothing.

We do not say that the Act of June 13, 1898, in terms denominates the cancellation of the stamps on any day after April 14th a crime or penal offence; but we do say that IT DOES EFFECTUALLY TREAT THE CANCELLATION OF THE STAMPS ON ANY DAY AFTER APRIL 14TH, AND BEFORE JUNE 13TH, AS IF IT HAD BEEN A PENAL OFFENCE, *and that* IT MAKES IT CAUSATIVE AND DETERMINATIVE OF THE THREE CENTS TAX. It makes the payment of the penalty the consequence of the fact that the stamps were cancelled on a particular day, that not being the effect when they were cancelled, and that is *ex post facto* operation. And the tax is in itself a "penalty."

The legal effect of the Act must follow and be graded by its actual, practical, substantial effect which we have shown, for—

> "The substance, not the shadow, determines the validity of the exercise of the power." *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 689; *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 582. Fuller, C. J.

CARD 2

This court holds in Burgess v. Salmon that a tax cannot be retroacted from afternoon to morning of same day.

In the case of *Burgess* v. *Salmon*, 97 U. S. 381, it appeared that on March 23, 1875, Salmon and Hancock stamped, sold, and removed for consumption from the place of manufacture certain tobacco which, under section 3368 of the Revised Statutes, was subject to a tax of twenty cents per pound. *On the afternoon of that day* the President approved the Act of March 23, 1875, increasing the tax to twenty-four cents per pound, but providing that such increase should not apply to tobacco on which tax under existing law shall have been paid when this tax took effect. By the terms of the law, and under its understood construction as covering the whole day on which it went into effect, it would have applied to Saturday; but this court held that the additional tax of four cents per pound, which amounted to $377, and which was paid under protest, could be recovered from the government. For although as a general rule the law knows no part of a day it could not reach back even to an anterior part of the same day on which it passed, so as to subject the citizen either civilly to a tax or criminally to a penalty; and the court said, Mr. Justice Hunt giving its unanimous judgment, that—

> "To impose upon the owner of the goods a criminal punishment or a penalty of $377 for not paying an additional tax of four cents a pound would subject him to the operation of an *ex post facto* law.
>
> "An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was enacted, or a punishment in addition to that then prescribed," citing *Carpenter et al* v. *Commonwealth*, 17 How. 456.

And then the court stated this broad principle of civil liberty, that—

> "The *ex post facto* EFFECT OF A LAW cannot be evaded by giving a civil form to that which is essentially criminal."

Thus the court denominates and denounces the *ex post facto* tax of a few hours of the same day upon which the law went into effect as in itself an "EX POST FACTO PENALTY."

Thus the court made exception to the time-honored maxim that "the law knows no fractions of a day" which itself had previously ratified, and cut one day in twain to intercept the incidence

of a tax enacted on the afternoon of that day from reaching to the morning thereof.

And if Congress cannot reach to the morning of a single day by an act of the afternoon with tax, tribute, or penalty, how much the less can it reach over the morning to post its tax enactments on the casual incidents of days gone by, take up transactions that were closed, and give to them new effect and consequence which they never before possessed, and heap the penalty of tax and the penalties of fine and confiscation that follow in the train of non-payment of tax upon owners who had bought tobaccos, and upon tobaccos which had been tax-paid one, two, three, ten, thirty, sixty, or one thousand, or ten thousand days before the enactment of the law that imposed them?

No such excessive and egregious wrong as this appeared in the *Burgess* v. *Salmon* case. The law therein considered stopped in its retroaction and its retro-gradation of things at the beginning of the day of its passage. It did not apply the new four cents tax per pound to any tobacco which was already tax-paid. It left the uniformity of the past time undisturbed up to that day. And the court cut down its purview to the very afternoon of that day, to the very "*punctum temporis*" of the approval of the Tax Act, fixing there the line of demarkation to the tax power, and putting there the interdict of its tax limitation on all past time and its doings, whether embraced by an hour, a day, or sixty days. It construed the past as enfranchised and saved from invasion of any new tax or any new penalty at all. And so we may here, with intensified significance, declare as to Patton what the court declared as to Salmon, that—

> "*To impose upon Patton, the owner of the goods, a criminal punishment or a penalty of $3,062.28 for not paying an additional tax of three cents per pound would subject him to the operation of an ex post facto law.*"

So, then, this arbitrary, unnatural tribute demanded of Patton, and paid under protest, is not a tax at all, being without the base of taxable things and beyond the pale of the taxing power. It is not a tax, but a penalty. It is not one penalty measured by the $3,062 28 already paid, but without that payment there would be tied to it a train of cumulative penalties.

IT IS NOT A PENALTY FOR A MISDEMEANOR OR A FELONY ATTEMPTED TO BE REACHED BY EX POST FACTO ACT, BUT UPON DILIGENCE AND DUTY THAT WERE MANDATORY CONVERTED INTO CRIME BY EX POST FACTO IMPUTATION.

So, too, the penalty paid by Patton must, under the tenets of the Constitution and under the express decision of this court, be paid back to Patton, and he go hence with his costs in this behalf expended.

In United States v. Burr this court eliminates the retroactive and ex post facto language and construction of the (Wilson) Tariff Act.

In *United States* v. *Burr*, 159 U. S. 78, the legislative history of the Tariff (Wilson) Act of 1894 was fully set forth, and though by its express terms its schedule of rates *took effect* "from and after the first day of August, 1894," yet the Act itself did not pass Congress until August 13, 1894, and it did not become a law until August 28, 1894, by the President's silent permission—he not vetoing it. This court held that goods entered at the custom-house August 28, 1894, twenty-seven days after the Act in terms purported to take effect, were not liable to duty under it. This was a case of the construction of the legislative intent; but one of the considerations that forced this construction upon the court was that in certain cases of dealers in playing cards the effect of a different construction would be, as said by Chief Justice Fuller, that—

> "Every dealer, if the Act were treated as operating retrospectively, would not only be liable for a tax of two cents a pack on every pack of playing cards manufactured or sold, or removed from the place of manufacture, and *upon every pack of playing cards in stock on or after August 1st*"—

And now mark this:

> "*But to an ex post facto penalty of fifty dollars for every pack of playing cards that he had sold or removed between August 1st and August 28th. Of course those sections cannot be given a retroactive effect according to the terms employed.*"

The courts regard facts, not names; effects, not pretensions.

The *Burr Case* is identical in principle with this case of Patton. There is no doubt that Congress knew when it passed the (Wilson) Tariff Act of 1894, as the President knew when it became a law, that by its express terms this retroactive and *ex post*

facto operation would be its ostensible meaning and effect, for such was its express language.

But this incongruous condition of affairs had been brought about, as the legislative history of the Act in the *Burr Case* showed, just as the incongruous compromise of the three cents per pound tobacco tax in this case was brought about—by differences between the two Houses of Congress and their Conference Committees. And it is evident that while the two Houses of Congress, in distress and tribulation of difference, cut the matter short in this case as in the *Burr Case*, and let the botched job go on and be enacted in legal form, they must have taken silent consolation to themselves in the faith that its anachronism, its purporting retroaction of tax levy, and its *ex post facto* penalties, which the Senate resisted and at first eliminated, and which were finally extorted from weary and despairing efforts of contention, would be eliminated by just judicial construction under the overruling mandate of the Constitution, and that so reformed the menacing evils would be annulled.

Looking to the mere words of the Acts in that case, and in this case, and we find retroactive tax and *ex post facto* penalty just as plainly set forth in one as in the other. But so abhorrent are such things that this court tears away the language that impute them, and holds that a Tariff Act "cannot apply to transactions completed when the Act became a law."

In *United States* v. *Islin*, 87 Federal Reporter, 194, it appeared that the (Dingley) Tariff Act of 1897 was approved by the President on July 24th of that year at six minutes past four o'clock p. m., Washington time.

It was held by the United States Circuit Court of the Southern District of New York that goods imported and entered at the custom-house on that day, but prior to six minutes past four o'clock, were not dutiable under the Dingley Act, but under the prior (Wilson) Tariff Act of 1894, the District Judge Townsend limiting the operations of the Dingley Act to "the precise time on the day on which it was signed by the President."

The opinion of the Board of Appraisers, which he confirmed and styled "admirable," contains an able exposition of the principles which denounce and invalidate *ex post facto* legislation, especially in connection with tax penalties. It shows that a tax

in form is no less "a penalty because it is called something else," AND NO LESS A PENALTY EVEN WHEN THE STATUTE DECLARES IT SHALL NOT BE "CONSTRUED AS PENAL" (see 87 Fed. R., p. 199), and that "the law looks at facts, not names," as said by Attorney-General Olney, in his opinion of September 9, 1893, to the Treasury Department, in a tariff case. It shows, farther, that the fiction of retroactive relation is uniformly held not to apply to statutes that carry penalties with them. And the fiction here by which the Act of June 13, 1894, attempts to retroact a tax levied that day to take effect on a cancelled stamp of April 15, 1898, must be regarded as but a flimsy disguise of *ex post facto* legislation, brought about, no doubt, by the exigencies of hostile Houses and committees of Congress, and finally submitted to as a *dernier resort* to save an important measure which insoluble differences imperilled.

XI.

IN CONCLUSION.

In contemplating ill-legislation like this we rejoice in the utterances of those jurists and statesmen whose minds, imbued with the spirit of the Constitution, have drawn from its just construction the principles that set their feet flat down upon arbitrary power.

We hear with pride and reassurance of the future the declarations of equality as the "thought of the Nation and the Constitution," which we have already quoted from this Court, and Alexander Hamilton's noble words sound like a new consecration of our fundamental law:

> "The genius of liberty reprobates everything arbitrary or discretionary in taxation.
>
> "It exacts that every man by a definite and general rule should know what proportion of his property the state demands.
>
> "Whatever liberty he may boast of in theory, it cannot exist in fact while arbitrary assessments continue." Hamilton's Works, I Vol. 270.

We feel that we are on solid ground in invoking "equal rights" as part of each man's tangible possessions; that we are lifted above sectional, topographical and geographical considerations; and that our free Constitution was intended to "carry justice," as King Alfred did, "TO EVERY MAN'S DOOR," when we hear this court, in the eloquent words of Justice Matthews, declare that—

"No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions to secure that equality of rights which is the foundation of free government." *Yick Wo* v. *Hopkins*, 118 U. S. 356 368.

Let it not be said, then, that to hold this so-called tax to be direct and unapportioned, multiform and variant in rate, arbitrary and unnatural in imposition, or to denounce it as *ex post facto* penalty, and to be unconstitutional, null and void, would embarrass the Government, with the innendo to be astute to maintain it. Not so. The Government cannot be embarrassed. It has 75,000,000 of people and their boundless wealth at its beck and call, every one of whom, and every bit of which, Congress can tax within the lines of the Constitution, which is above it, and above all.

This tax is a mere bagatelle to the Government. The Constitution is everything. And if it did embarrass the Government to preserve its letter and to cherish its spirit, then be it done. So much the better for the Government, and for the people. It will teach them the Constitution. It will prevent future infringements of it. Bad laws are great teachers. They teach power to make good ones, and the people to love good ones. And they teach everybody that foremost thing, next to "more perfect union," for which the Constitution was ordained: "to establish Justice."

We shall always have the more and more perfect union in just such proportion as we do the more and more establish justice.

Respectfully submitted,

JOHN W. DANIEL,
FRED. HARPER,
Of Counsel for Plaintiff in Error.

Lynchburg, Va., Nov. 11, 1899.

No. 426 16

Reply Brf. of Royall for P. C.

Filed Jan. 31, 1900.

Supreme Court of the United States.

J. D. PATTON.

v. No. 426.

J. D. BRADY.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO BRIEF OF ASSISTANT ATTORNEY-GENERAL.

JURISDICTION.

Supreme Court of the United States.

J. D. PATTON.

v. No. 426.

J. D. BRADY.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO BRIEF OF ASSISTANT ATTORNEY-GENERAL.

JURISDICTION.

The Assistant Attorney-General may be right in his contention that section 629 of the Revised Statutes is modified as he suggests. I forbear to discuss that question. But this suit was not brought under that section. It was brought under the act of 1875 as amended by the act of 1887. The Constitution provides that "the judicial power shall extend to all cases in law and equity arising under" the Constitution. The act of 1875 extended the original jurisdiction of the circuit courts "to all cases arising under the Constitution." Confering on them, therefore, the whole jurisdiction which the Constitution authorizes; and the act of 1887 does the same. If, therefore, the Circuit Court has no original jurisdiction of this case, Congress could not confer such jurisdiction upon it, as Congress has given it all the jurisdiction the Constitution authorizes.

In the course of the protracted and obstinate contest over the tax receivable coupons of the State of Virginia, I took the ground that when her Legislature passed an act designed to destroy the coupons, and one of the collectors levied on a tax-payer's prop-

erty after he had tendered coupons, by authority of the State's law, that the tax-payer could sue him for a trespass in the United States Court, though plaintiff and defendant were both citizens of Virginia, because the case "arose under the Constitution," by reason of the collector having acted under a State law claimed to be repugnant to the Constitution. I claimed that ever since the case of *Cohen* v. *Virginia*, 6 Wheaten, it had been settled that a case arose under the Constitution whenever it was necessary to construe the Constitution in order to decide it. In that case Chief Justice Marshall said: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either." 6 Wheat. 378.

This language is quoted by the court as correctly expounding the law in *Gold Washing Co.* v. *Keyes*, 96 U. S. R. 201.

In *Railroad Co.* v. *Mississippi*, 102 U. S. R. 140, the court quotes this language again and gives to Judge Marshall's construction of it its most emphatic approval.

I accordingly brought a case to this court framed upon this theory and it was decided according to my contention. It is the case of *Smith* v. *Greenhow*, 109 U. S. R. 669. The same thing was reaffirmed in the case of *White* v. *Greenhow*, 114 U. S. R. 307.

From that time forward during all that protracted coupon litigation it was understood that the circuit courts had jurisdiction of suits without regard to the citizenship of the parties, if the suit required a construction of the Constitution of the United States in order to its correct decision, and scores of suits were brought and entertained by the Circuit Court of the United States upon that theory.

To abandon it now would be to give up one of the cardinal principles of the law, and if it is to be adhered to, there is nothing more to be said of the jurisdiction of the court in this case.

The motion to dismiss was in effect a demurrer to the declaration, and the order dismissing was in effect a final judgment against the plaintiff on the merits.

Upon the merits it seems to me that the case of *Royall* v. *Virginia*, 116 U. S. R., p. 572, ought to be decisive. If the State could not stop Royall from practicing his profession after he had offered to pay his tax, Congress ought not to be allowed to take from the plaintiff his money after he has earned it.

WM. L. ROYALL,
For Plaintiff in Error.

PLAINTIFF'S

BRIEF

No. 16.

Brf. of Royall for P. E.

16

Filed Sept. 7, 1901.

IN THE

Supreme Court of the United States.

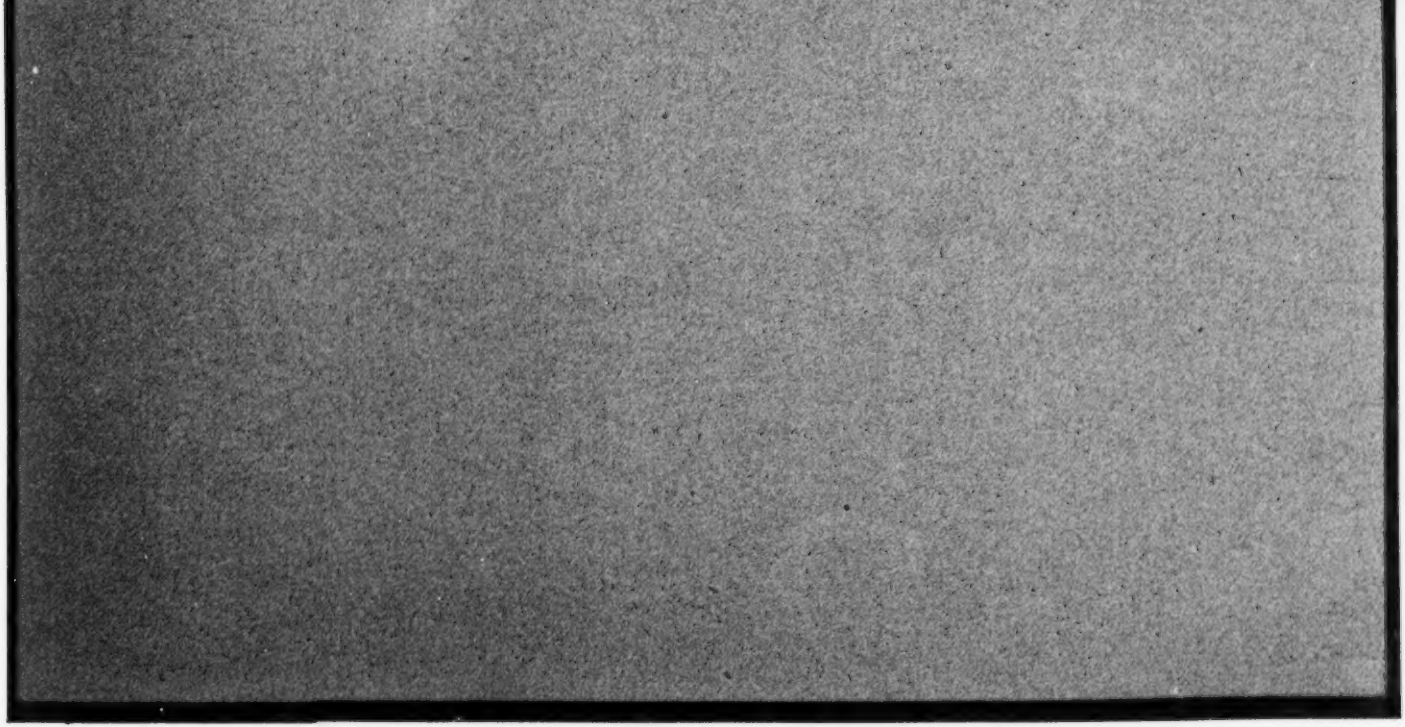
IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JAMES D. PATTON, TRADING AS JAMES D. PATTON & CO.,

vs.

JAMES D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.

Brief of William L. Royall for Plaintiff in Error.



IN THE

Supreme Court of the United States.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

JAMES D. PATTON, TRADING AS JAMES D. PATTON & CO.,

vs.

JAMES D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.

BRIEF OF WILLIAM L. ROYALL FOR PLAINTIFF IN ERROR.

Facts of the Case.

The plaintiff in error is a merchant and trader in the city of Richmond, and the defendant is the Collector of United States Internal Revenue.

In the month of May, 1898, the plaintiff bought 102,076 pounds of manufactured tobacco, on which all taxes were paid, and which bore on it stamps cancelled after April 14th, 1898, and the same was removed from the factory. He bought it in the regular course of business, expecting to make a profit from a rise in the tobacco.

On the 13th of June, 1898, Congress passed the new War Revenue Bill which imposed an additional tax of three cents a pound on this tobacco, and the defendant in error coerced plaintiff in error into paying $3,062.28, the amount of this additional tax. Plaintiff paid it under protest, applied to the Commissioner of the Revenue for the return of it, was refused, and then he brought his suit to recover same in the United States Circuit Court for the Eastern District of Virginia. The court held the act of Congress imposing the tax to be constitutional and dismissed the suit, and this writ of error was sued out.

Assignment of Error.

The action of the court in dismissing the suit is assigned as error.

Death of Defendant in Error.

After this cause was docketed in this court and before it was reached for argument the defendant in error, Brady, died, and the cause was revived under the rule of the court against his personal representatives, and as the Solicitor General has notified me that he will claim that the cause abated with the death of Brady, I proceed to discuss that matter, premising that I filed a brief upon that question at the last term of the court as well as a brief upon the merits; and that seeing reason to add to both of these, I now combine them in this one brief, and I ask the court to take the case upon this brief rather than upon those other two.

Does the Action Survive?

This question is, of course, to be determined by Virginia law.

Bauserman v. *Blunt*, 147 U. S. R. 647.

Professor John B. Minor is authority upon Virginia

law—almost as high as her Court of Appeals. In the fourth volume of his Institutes, Part I., ed. 1893, at page 614, he says:

"It will be observed that all actions *ex contractu* are thus revivable; and also all actions *ex delicto*, where the injury complained of relates to the property. But where it relates to the person only as slander, assault, etc., it is in general not revivable."

That is the distinction made by the law of Virginia. Every wrong that relates to property survives against the personal representative. *Lee* v. *Hill, Adm'r*, 87 Va. 497; *Ferrill* v. *Brents*, 25 Gratt. 770.

The injury here plainly related to property, and, therefore, plainly survives.

If the act of Congress under which this money was extorted from Patton was void, then clearly Brady had $3,000 of Patton's money, and Patton could have brought an action of *indebitatus* assumpsit for it. The form of action that was brought is of no consequence. The court looks at the facts stated and names the action for itself. In *Lee* v. *Hill*, 87 Va., the court says:

"In determining whether a cause of action survives to the personal representatives, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced." Page 501.

This is quoted from a Connecticut court, but it is laid down as the law of Virginia.

The court holds distinctly and unequivocally that if the injury complained of is one that an action of assumpsit could be brought for, the action survives against the personal representatives, and that whether it is brought in the form of an action *ex delicto* or not.

Section 2655 of the Code of Virginia (Code of 1887) reads as follows:

"An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."

The case of *Lee* v. *Hill* deals with the subject both as a common law matter and as it stands under this statute.

The word "goods" includes money, so that Brady took and carried away "goods."

Bouvier's Law Dictionary, word Goods.

Anderson's Law Dictionary, word Goods.

Abbott's Law Dictionary, word Goods.

In the Elizabeth and Jane, Justice Story said, 2 Mason, 407:

"It cannot be doubted that money, and, of course, foreign coin, falls within the description of goods at common law; and a legacy of 'goods' would *ex vi termini* carry money or coin unless that construction were repelled by the context."

If the record of *James* v. *Hicks*, 110 U. S. 272, is inspected, it will be seen that the suit was commenced against the collector's administrator, but this court sustained it. The same is true of the *Savings Bank* v. *Blair*, 116 U. S. 200.

The gist of *Lee* v. *Hill*, 87 Va. 497, is that if assumpsit would lie for the injury, it survives against the personal representatives. Patton could certainly have brought *indebitatus* assumpsit against Brady for money had and received.

Elliott v. *Swartwout*, 10 Peters 137.

Bond v. *Hoyt*, 13 Peters 263.

"Appropriate remedy to recover back money paid on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. When the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received."

City of Philadelphia v. *The Collector*, 5 Wall. 731-32; 4 L. R. A. 300 (note).

The case arises under Virginia law, and the case of *Brown, Etc.*, v. *Greenhow*, 80 Va., at page 122, is conclusive.

ARGUMENT ON MERITS.

I understand the income tax decision, in its last analysis, to mean this:

Every tax that Congress can levy under the Constitution is a direct tax to be apportioned according to population, unless—

First. It be some sort of indirect tax of which we have so far had no example. (The court said, 157 U. S. R., at page 557, "And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, impost and excise,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances have invited thorough investigation into sources of revenue." This idea runs through the whole opinion in this volume and also in the next.)

Or *second.* Unless it be an impost, a duty, or an excise, in which case it is to be uniform only, even though it may also be a direct tax.

Assuming this to be the law, I shall examine the present case with that as its starting point.

If this assumption is correct, then the retroactive part of the third section of the act of June 13th, 1898, is clearly repugnant to the Constitution, unless—

(a) It is one of those indirect taxes mentioned, or

(b) Such an impost, duty, or excise, as is contemplated by the Constitution.

I can conceive of no ground upon which it can be said to impose one of the indirect taxes referred to.

It is not an impost. The word impost was used by the framers of the Constitution to describe the taxes laid upon goods imported through the custom-house.

This tax is clearly, therefore, not an impost. Nor is it a duty. (Duty same as impost. 7 Wall. 445, etc.) The word duty was used to indicate such taxes as are represented by stamps on papers.

The following is reported by Mr. Madison to have taken place in the Convention on August 16th:

"Mr. L. Martin asked what was meant by the Committee on Detail in the expression 'duties' and 'imposts.' If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.

"Mr. Wilson: Duties are applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties, etc." The Madison Papers, Vol. III., page 1339. See to same effect opinion of Harlan, J., 158 U. S. 649, bottom of page. This meaning of "duty" is placed beyond all question by Luther Martin's letter. 1 Elliott 368.

Duty, What?

In his argument in *Hylton* v. *U. S.*, 3 Dall. 171, Alexander Hamilton said: "If the meaning of the word 'excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered an 'excise.'

. . . An argument results from this, though not perhaps a conclusive one, yet when so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." 7 Hamilton's Works (Lodge's ed.) 333.

This so obviously just principle of construction is quoted by this court, with apparent approval, in the income tax cases. 157 U. S. R., at page 572.

The "excise" was introduced in England from Holland in 1642. In 1694, during the reign of William the Third, the principle of imposing taxes by requiring written or printed instruments to have stamps affixed to them was also introduced in England from the same country. Dowell's History of Taxation, Vol. 2, page 62.

Both excise, in spite of its unpopularity, and stamps were ever afterwards held on to tenaciously by the English government, but each was held to as a principle independent of and separate from the other. There was a department of government controlled by a Board of Commissioners of Excise that superintended the collection of the excise taxes, and there was another department of government controlled by a Board of Commissioners called the "Commissioners for Managing the Duties on Vellum, Parchment and Paper" that superintended the collection of all taxes imposed by the sale of stamps on written or printed instruments. But these two departments of government were as entirely separate and distinct from each other as the war and the navy departments were, and the nature and character of the taxes grew thereby to be considered and treated as being essentially different. In the vernacular, and in scientific treatment of the subject, imposts were understood to be taxes collected at the ports, excise was understood to be taxes imposed upon consumable goods, and stamp duties were understood to be the taxes imposed

upon written or printed instruments through affixing to them stamps bought from the government. This was the common understanding of the people in England in 1787, when the framers of our Constitution were sitting in convention, and, *ex vi termini*, it was the common understanding of our own people, who had the same understanding of such matters as their English brethren, from whom they had just been separated.

In 1804 the Parliament of Great Britain revised all the laws imposing stamp duties and consolidated them into the act of 44, George Third, Cap. 98. This act enacts no new legislation, but only brings into one act the dozens of acts that had been passed since the introduction of stamp duties over a hundred years before; and it shows, in its schedules, that Parliament raised revenue by requiring stamps of differing values to be affixed to almost every written or printed memorial of the transactions of men. The "stamp duties," therefore, were a matter of as familiar every-day talk to our ancestors of 1787 as the "protective tariff" is to us. And as they were not included in England in what was understood either as imposts or as excise, but were a set of duties separate and apart to themselves, and were a most important branch of revenue, they required a separate word in framing our Constitution to authorize their imposition; and hence, as Wilson said, they would be authorized by the word "duties," while they would not be authorized by either imposts or excises.

It is perfectly clear, therefore, that in authorizing "duties" the framers of the Constitution had in mind to empower Congress to raise revenue by requiring stamps to be affixed to written or printed instruments. It cannot be denied that "duty" is sometimes used in the Constitution in a wider sense than that contended for here, but in the place where Congress is given power to impose "taxes, duties, imposts and excises," "duty" is there meant to de-

scribe the taxes raised by selling stamps to be affixed to written or printed instruments.

Excise, What?

We come now to the question, What was meant by excise?

Dr. Johnson's Dictionary was published in 1755. It defines the word thus:

"A hateful tax levied upon commodities, and adjudged, not by the common judges of property, but wretches hired by those to whom excise is paid."

Sir William Blackstone says also of the excise in his Commentaries, Vol. I., page 320 (margin), published about the same time:

"But from the original to the present time its very name has been odious to the people of England"; and after mentioning a number of articles that had been added to the list of those "excised," he says of it: "A list which no friend to his country would wish to see farther increased."

The excise was first introduced into England by the Long Parliament during the great rebellion, though when it was noised abroad that Parliament contemplated doing it, it resolved that any person saying it intended to do so should receive condign punishment. It was universally unpopular because of the tyrannical authority conferred upon the Commissioners of Excise who collected it. Nevertheless, it was held on to by the government steadily, and the opposition to it either died out or was little heard from. This encouraged Walpole to introduce his general statute of excise in 1733. The statute contained no new principle, but it was called "the Excise Bill," and the name damned it. It divided parties and created such a furore as had not been known in England in many years. Dr.

Johnson and Sir William Blackstone wrote while the echoes of this partisan strife were still in their ears, hence the bitterness of their language. See an account of Walpole's bill in Dowell, Vol. II., page 100, *et seq.*

The best treatise upon excise that I know of is that contained in the Encyclopedia Britannica word "excise," though containing a plain error in saying excise is confined to home goods. It defines the word thus:

"A duty charged on home goods either in the process of their manufacture or before their sale to the home consumers."

The Century Dictionary defines the word thus:

"An inland tax or duty imposed on certain commodities of home production and consumption as spirits, tobacco, etc., or on their manufacture and sale."

The case of *Rex* v. *Justices of Surry*, 2 Durnf and East 510, was decided in 1787 at the very moment the Constitutional Convention was sitting. It held that, technically and accurately speaking, excise dealt with liquors only. In the second volume of the thirtieth edition of Burns Justice (the work is in the library of the Bar Association of New York City), word excise, the following language is found:

"The duties of excise, *properly so called*, are those imposed on ale, beer, cider, perry, mum, mead and spirituous and other liquors, and also on malt, chicory and sugar, home-made, being particularly so denominated by the laws of excise or so accounted by them.

"But, according to *R.* v. *Justices of Surry*, 2 T. R. 504, the distinction generally understood between excise duties and inland duties under the management of the Commissioners of Excise is this: That the law of excise is understood to relate only to liquors; and that the inland duties

under the management of the Commissioners of Excise are understood to apply to malt, dry goods and other articles which had of late been put under their management."

From this it would appear that excise applied, technically, in England in 1787 to liquors only, and if that is to be understood as the sense in which the framers of our Constitution used the word, then this tax upon tobacco is not an excise, but a direct tax, and it is plainly void because not apportioned. But, as the extract from Burns Justice shows, there were other taxes put under the control of the Commissioners of Excise, and these others had, in common understanding, come to be considered excise duties, and the court may therefore hold that the word was used in our Constitution in this popular rather than in its technical sense.

There is the more reason for expecting that this will be the view of the court from the fact that the larger sense is the one in which it had certainly been understood in this country. In Massachusetts they had for a long time had the tax known as the excise, and it was understood there to apply to many things other than liquors. This is shown by the debate in Congress in 1794 over the carriage tax as quoted by Chief Justice Fuller in the income tax case, 158 U. S. R., at page 623, as follows:

"The bill passed the House on the 29th of May apparently after a very short debate. Mr. Madison and Mr. Ames are the only speakers on that day reported in the annals. 'Mr. Madison objected to this tax on carriages as an unconstitutional tax; and as an unconstitutional measure he would vote against it.' Mr. Ames said, 'It was not to be wondered at if he, coming from so different a part of the country, should have a different idea of this tax from the gentleman who spoke last. In Massachusetts this tax had long been known; and there it was called an excise.'" Just as the tax on carriages was at that time called an excise

in England, as is shown by the extract from the work of Bell & Dwellypost.

The Encyclopedia Britannica's article on the word excise concludes thus:

"The numerous statutes of excise, well annotated, have been collected and published under the authority of the Commissioners of Inland Revenue in one volume; 1873."

I made a vain search through this country and England for this volume by this name for a long time, but recently I found in the library of the Bar Association of New York City a volume purporting to be the laws of excise by Bell and Dwelly, 1873, which is manifestly the work referred to by the Encyclopedia Britannica. It contains, as a preface, a reference to every statute ever passed by Parliament upon the subject of excise.

In a note to page 4 the authors of this work say:

"In 1797 the following articles were subject to excise duty, viz.: Auctions, bricks, glass, hops, licenses, malt, paper, soap, spirits (British), vinegar, starch, stone bottles, sweets and mead; tea, tiles, beer, candles, coaches, cocoanuts and coffee, cider and perry, hides and skins, pepper, printed goods, salt, spirits (foreign), tobacco and snuff, wine, wire."

This affords a favorable opportunity for enquiring, When is a congressional tax upon personal property an excise, to be uniform only throughout the United States; and when is it a direct tax, to be apportioned according to population?

The dictionaries, as we have seen, say that an excise is a tax upon consumable HOME, personal property. But, as the above extract shows, the tax on tobacco was considered an excise in England when the Constitution was adopted, and not a pound of tobacco was ever grown in

England. All of it from which taxes were collected was imported from abroad, and the tax on it was paid at the custom house as one of our imposts. The first excise imposed in England was on ardent spirits also, and it was imposed upon foreign liquors as well as upon domestic. I do not understand where the dictionaries got this notion that an excise involved the idea of "home goods" anyhow. There is certainly nothing in the legislation of England to justify it.

But if excise may be addressed to foreign goods as well as to domestic, then the enquiry is suggested, May consumable foreign goods that have paid their imposts at the custom house be excised in the hands of the merchant who has them for sale, or in the hands of the consumer who has bought them for use? If they may, then excise is greater than ever was veto even.

The materiality and importance of this enquiry will be further illustrated when a subsequent part of this brief treating of the scope of excise is reached.

I again repeat the question then, What is the rule for determining when a tax on personal property is an excise, to be uniform only throughout the United States; and when it is a direct tax, to be apportioned? Where does excise end and direct tax begin, the court having decided in the income tax case that personal property may be the subject of direct taxation?

If it be said that the "home goods" test is to be dropped, and that the test is to be "consumable commodities," still the question will come back, Are imported consumable commodities that have paid their imposts at the custom house to be excised thereafter?

To my mind, the subject is involved in hopeless confusion, and the only logical solution of the difficulty is for the court to go back to the case of *Rex* v. *Justices of Surry* and hold that excise is a tax on ardent spirits only, and

that all other taxes on personal property are direct taxes, which would make the tax in this case void.

I fear, however, that the popular and dictionary idea of excise will be adopted by the court, and I shall therefore argue the case upon the assumption that this will be done.

The first point to be noted in respect to excise is the character of the tax. It is not a tax at all. It is, as its name indicates (excise—cut out of), a scoop into a subject by the law-making power without any reference whatever to the proportional part of the public burdens which that subject should bear. Parliament dipped into a barrel of beer and took out of it as much as it pleased. It dipped into a box of tobacco and took out the number of pounds that suited it. It "excised" a subject—cut out of it so much as it wished.

The "excise" was a tax in Massachusetts from the foundation of the colony, and its character has been the subject of judicial enquiry there. In *Oliver* v. *Washington Mills*, 11th Allen, the court, speaking of the difference between a tax and an excise, says, at page 274:

"An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid."

This is intended to refer only to the character of the tax, and not to the persons or classes of persons on whom it may be laid, as will very plainly appear when this case is more particularly commented on later on.

To determine then what excise means we have for our guidance, first, an enumeration of the articles that it fell on in Great Britain in 1787. We have, second, the nature

of the tax as judicially determined; and we have, third, the definition of it, or the common understanding of men about it, as given by the Encyclopedia Britannica and the Century Dictionary. Taking these three sources of information and combining them, it would seem that the leading idea of excise is that it is a tax, laid without rule or principle, upon consumable articles, upon the process of their manufacture and upon licenses to sell them.

Assuming then that the court has decided the income tax case according to the intentions that the framers of the Constitution had in their mind, and giving to the words, imposts, duties and excise, the interpretation suggested in this brief, we have a highly artificial system of federal taxation, but we have the Convention fashioning a very complete system that would enable the government to reach fully every possible source of revenue; but with restrictions placed in all directions, such as the framers of the Constitution thought would be appropriate to any given exercise of the taxing power. We have the government given full authority to raise revenue from all articles brought into the country by as high duties as it pleased to impose, subject only to the restriction that those duties should be uniform. We have it given authority to require men to pay as much as it pleased upon all the written or printed memorials of their transactions, subject only to the condition that the duties should be uniform, and then we come to the two great subjects of production and consumption, and when we get there we find it gives authority to impose direct taxes, or taxes upon the sources of what is to be consumed; that is, production, at any rate it pleases, so that these taxes are apportioned according to population; and we find it given authority to impose excise, or taxes, upon what is consumed at any rate that suits it, subject to the sole condition that they shall be uniform.

This scheme covers the whole field of taxation and makes

it yield all that can be got from it, but by a system that makes taxation bear upon the country and on districts lighter or heavier as the Convention thought the nature of the case required.

Since tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed, I shall assume that the court will hold that the tax in this case is an excise.

Modern conditions have, of course, greatly modified the early objections to excise, if indeed they have not entirely obliterated them. Nevertheless, the tax is essentially an arbitrary imposition, utterly wanting in all the elements of proportional and, therefore, just taxation, and it behoves the court to enquire curiously into each exercise of this arbitrary power as it comes before the court to see to it that spoliation is not accomplished under the guise and name of excise taxation.

First Proposition Contended For.

The first proposition advanced in this case then is that Congress may excise an article as it pleases so that the excise does not amount to spoliation or confiscation. But that having excised it, it has excised it, and the power is exhausted. It cannot excise a second time.

Possibly the property is not therefore to go free of taxation thereafter because it has been excised. If a man who has paid an excise upon a thousand boxes of tobacco chooses to stack it up in a warehouse and keep it there ten years, the tobacco is not, possibly, to go tax free because it has borne an excise. It receives the protection of the laws, and it should bear its part of the burdens of the laws. But it is to be taxed thereafter according to the principles of taxation, and not according to the arbitrariness of excise. Taxation upon it thereafter is to be direct taxation

imposed according to population, which makes it bear a burden that is proportional to that borne by other property.

The court must put some limitations upon this word, and there is a great reason why this construction should be given to the word excise. The government's construction, under which it has imposed a heavy burden upon one of its citizens who bought tobacco upon its assurance that the property had paid all obligations to which it was liable, permits the government to set a trap for the unwary and make them the victims of that confidence in their government which all good citizens should have. It enables the government to delude its citizens into well justified business ventures of which the government will seize the profits when the citizen had supposed he had made a well earned reward. It enables the government to make the citizen speculate and risk his resources for its benefit, where he supposed he was speculating for his own benefit. And though in this case the government robbed him of only three thousand dollars, the principle would allow it to rob him of three millions of dollars if the transaction involved any such sum.

The construction contended for safeguards the citizen in his daily pursuits where he might be often entrapped upon the government's theory. Tobacco is not the only article excised. Indeed, if we are to suppose that all articles excised in England when our Constitution was adopted, may also be excised here, many of the articles of ordinary traffic may be brought under the excise. The citizen is liable, therefore, to be entrapped upon many articles besides tobacco and spirits. In dealing with articles which bear the government stamps, marked "cancelled," the citizen ought to be considered as in the same class with those who buy negotiable paper. The government should be just as much held estopped to impose additional burdens upon the article, except in the due and orderly course

of equal taxation, as the maker of the negotiable instrument is held estopped to set up equities against the bona fide holder without notice. And, at last, what is the government deprived of by such a construction? Of the additional tax upon tobacco which can be hurriedly made up between the proposing of the tax and the enactment of the proposition into law? That ought not to be much, but much or little, it is better the government should lose that much than that it should be clothed with an arbitrary power to ruin the citizen at its will.

It may be said the person who purchases tax-paid tobacco may add the new tax to the price he asks for his tobacco. But if the principle is to be accepted, there is no reason why the additional tax may not, with the old tax, be more than the new tax on new tobacco, and the purchaser may, therefore, be compelled to sell at a loss.

Indeed, if the principle is conceded, there is nothing to prevent the government making this second tax whatever it chooses. A citizen might have invested one million of dollars in tax-paid tobacco in May, 1898, and the government might in June, 1898, have imposed a tax of nine hundred thousand dollars upon it. Confiscated it under the pretense of taxing it after it had paid its tax. This is a most serious power to entrust anywhere.

The facts of this case outside of the record, however, prove it a good illustration of the oppressive nature of this power as the government claims it.

The tobacco purchased by the plaintiff in error was put up in the form of four plugs—six-inch fours, as the trade calls them—to the pound, and the plugs were to be sold by the retailers for ten cents a plug. The tax could not be added to these plugs, for it would make them sell for more than ten cents a plug, and that kills the sale, as the public insists upon having a ten-cent plug. Therefore, the plugs in all tobacco put up after the new law went into effect

were smaller than those involved in this case, but were still sold for ten cents a plug. The public will stand being imposed on to a small extent if it can get plugs for ten cents each rather than pay eleven cents for plugs that contain more tobacco. The additional tax, therefore, practically ruined the sale of the tobacco in this case. It had to be worked off in all sorts of odd ways, the retailer preferring the newly-taxed tobacco, though the plugs were smaller, because he could offer them for ten cents a plug.

It is obvious that an arbitrary power of this sort may be used in infinite ways to the injury and oppression of the citizen, and I apprehend that the court is only concerned to know that it has been exercised in an arbitrary, unjust and destructive way to set the seal of its condemnation upon that particular exercise of it.

Another view of this subject is suggested by what has already been said of excise being a tax upon consumption. Gibbon tells us of an eastern potentate who levied two taxes upon his subjects in one year. They remonstrated, saying that if he would get Allah to send them two crops in one year, they would willingly pay two taxes in one year; but that as they only gathered one crop in one year they thought they should pay only one tax in one year.

In the nature of things taxation should bear some relation to the uses men get from the thing taxed. Land may reasonably be required to pay a tax each year, because it yields a crop each year. So may bonds that yield a crop of coupons each year, and rents that come in each year. But tobacco is dead when it pays its tax, and can never yield anything but itself, and the only use man can put it to is to consume it. It is good only to be destroyed. The same is true of all other consumable articles—the subjects to which excise is applied. The court should say, therefore, that as the subjects to which excise is applied can make no yield to their owners when they are once excised, they have made

the only contribution to government that they can be called upon to make. Unless this is the true principle governing the case, the government may consume the entire subject by repeated excises imposed upon it.

Excise Must be Reasonable.

There is another most potent reason why the construction contended for should be put upon this word "excise." The whole tendency of modern decisions is towards the proposition that any authority whatever must be exercised in a way that is REASONABLE. This subject has been so fully and so recently discussed before the court, in what is known as the Joint Traffic case, that I would not be justified in consuming the court's time by a repetition of the arguments here. I refer on this point to the briefs filed in that case.

In affirming the power of the State's Railroad Commission to regulate rates the court is careful to declare that the regulations shall be reasonable. It is only fair to assume that when the framers of the Constitution authorized Congress to impose excises they meant reasonable excises. This view is confirmed by the Constitution of 1780, adopted by the State of Massachusetts. By Article IV. of chapter 1 of that Constitution the Legislature is given authority "to impose and levy REASONABLE duties and excises." This was the view of excises entertained by the public at the time the Constitution of the United States was adopted. They were to be reasonable. It must be supposed, therefore, that when the framers of the Constitution authorized Congress to impose excises they meant reasonable excises, and it is unreasonable for Congress to impose such an excise as this plaintiff in error has been compelled to pay. The truth is, an excise is no tax at all. It is an arbitrary imposition, fixed without rhyme or reason. The framers

of the Constitution saw fit to say that Congress might impose this arbitrary burden upon the citizen, but it is not for the court to extend the authority an inch beyond the limits that the framers of the Constitution assigned to it. The view generally entertained of an excise at the time our Constitution was adopted was that it was a tax that could be made most onerous and oppressive, and was not to be tolerated unless imposed with reason and according to justice. In a debate in the Continental Congress in 1783, Mr. Wilson, of Pennsylvania, said, in describing the sources of revenue to which Congress might resort:

"An excise had been mentioned. In general, this species of taxation was tyrannical and justly obnoxious, but in certain forms had been found consistent with the policy of the freest States. In Massachusetts, a State remarkably jealous of its liberty, an excise was not only admitted before, but continued since the Revolution. The same was the case with Pennsylvania, also remarkable for its freedom. An excise, if so modified as not to offend the spirit of liberty, may be considered an object of easy and equal revenue." Madison Papers, Vol. I., page 306.

CONFISCATION.

Again, the tax in this case is not taxation at all. It is confiscation. The essential idea of taxation is that all the citizens shall be required to contribute ratably from their possessions for the support of the government. Equality is of the very essence of taxation. But the authority claimed by the government is a power to confiscate. Patton had made the money by a legitimate business venture, and it was his. But the government steps in and takes it from him by force.

In one of his most celebrated judgments, Chief Justice Marshall said that the power to tax was the power to destroy, and that celebrated dictum has been as much quoted

as any that ever came from his pen. Nevertheless, I insist that it is unsound. The power to tax is not a power to destroy. It is a power to take a part with which the remainder may be preserved. Taxation may become so oppressive that an individual may be ruined by it, but that is not its objective point. It is always imposed with the idea of preserving, and not of destroying. Government undoubtedly possesses the right to destroy. If a citizen's dwelling-house is in the line of a fort's fire, government may destroy the house to send its shot to the enemy's ships. But that is a part of the power of eminent domain, not as that term is technically understood, but as it is in its nature, as growing out of the maxim *salus populi suprema lex.*

If thus it became necessary for government to destroy the citizen's property, government may undoubtedly destroy it to save the State. But it does not do it in the way of taxation. It taxes to preserve, it destroys to save the nation's life.

It is a bold as well as a dangerous thing to attack anything whatever that came from the pen of Chief Justice Marshall sitting in judgment in this sacred place. But I am emboldened to this assault because I am able to quote Chief Justice Marshall against Chief Justice Marshall. In the case of *Fletcher* v. *Peck,* 6 Cranch, Chief Justice Marshall said at page 135:

"It may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

None have been found to contest the soundness of this proposition, and it has been repeatedly affirmed in effect by this court.

Loan Association v. *Topeka,* 20 Wall., at page 662.

Parkersburg v. *Brown*, 106 U. S. 487.

Hurtado v. *California*, 110 U. S., at pages 536-7.

Legal-Tender Cases, 12 Wall.; opinion of Chase, Chief Justice, at pages 581-2.

In *Hurtado* v. *California*, 110 U. S., the court says:

"Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude."

I understand this principle to be canonized by the declarations of this court and the different justices of it from time to time. In the income tax case Mr. Justice Harlan said:

"If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich because of their wealth, the court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of *taxation*, but was repugnant to those principles of natural right upon which our free institutions rest, and therefore was legislative SPOLIATION under the guise of taxation."

In the case of *Nicol* v. *Ames*, 173 U. S., the court says at page 615:

"But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encoachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax."

This word "spoliation" seems to have been selected advisedly.

I understand the court to mean, therefore, that whenever an act of Congress amounts to "spoliation" it will declare it void upon general principles, and as against common right.

If an act can amount to spoliation, this one certainly can. The laws had invited the plaintiff in error to buy this tax-paid tobacco upon the assurance held out to him by them that he should have whatever profits he could make by the operation, and yet, as soon as the profit is realized, under the pretence of taxation, the government comes in and confiscates the profit the plaintiff had made, and diverts it from his pocket to the government's treasury. This is "spoliation" of the most flagrant character.

Unjust Discrimination—Unequal.

So far this case has been treated as though the tax was imposed upon all the people of the United States who bought tax-paid tobacco. But such is not the fact. It is imposed upon but a small fraction of such of the people of the United States. It is imposed upon those only who bought tax-paid tobacco between April 14th, 1898, and June 13th, 1898. Smith bought tax-paid tobacco on April 13th, 1898, and he pays no further tax upon it. But Jones bought tax-paid tobacco on April 15th, 1898, exactly the same in all respects as the tobacco bought by Smith, and he must pay this additional tax upon his tobacco. This, it is submitted, is a most unequal excise—an unreasonable, unjust and outrageous discrimination against Jones. It is a discrimination, too, that if allowed would open the door to the most scandalous favoritism. The chairman of the Committee on Ways and Means might have had a friend who was given the tip to buy a great quantity of tax-paid tobacco prior to April 14th, 1898. He might have had an enemy who unfortunately bought a great quantity of tax-

paid tobacco after April 14th, 1898. This chairman gets April 14th adopted as the day to mark the dividing line, and makes his friend's fortune, and shares, perhaps, in the swag, while he gratifies his malice by ruining his unfortunate enemy. It is surely contrary to the most elementary principles on which government rests to clothe any man or any set of men with an arbitrary and irresponsible authority like this, to impose taxes upon one man that another is exempted from. The Supreme Court of Massachusetts has had a tax of this sort, claimed to be an excise, before it, and it has declared it void *ab initio* as contrary to the first principles of justice. The case is *Oliver* v. *Washington Mills*, 11 Allen 268, a little explanation of which is necessary to a proper understanding of the case.

Article 4 of section 1 of chapter 1 of the Constitution of Massachusetts provides that the Legislature shall have power "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of and persons resident, and estates lying within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever brought into, produced, manufactured, or being within the same."

By an act passed in 1863 the Legislature provided as follows:

"Every corporation organized under a charter or under general statutes, paying dividends in scrip, stock or money, shall reserve from each and every dividend one-fifteenth part of that portion due and payable to its stockholders residing out of the Commonwealth, and shall pay the same as a tax or excise on such estate or commodity to the Treasurer of the Commonwealth within ten days after such dividend is declared payable."

The Washington Mills having stockholders that resided in Massachusetts and stockholders that resided out of Massachusetts, resisted payment of this tax upon their outside stockholders upon the ground that the act was unconstitutional. The first question dealt with by the court was whether the act could be sustained as imposing a proportional tax. The court had no difficulty in disposing of this question by finding that the tax was plainly not a porportional one. But as the act declared in terms that the burden imposed might be considered an excise, the court was then confronted with the question whether the tax could be sustained as an excise. It passed by the question whether a dividend on stock could be considered a commodity or production to which an excise could be applied with a strong intimation that it was not, and took up the question whether, granting that an excise could operate on a dividend, this excise could be sustained, and it held that it could not. It held that equality was of the very essence of such an imposition, and this excise was not equal because it applied to those stockholders who resided outside of Massachusetts, but did not operate upon those who resided in Massachusetts, although both sets of stockholders stood in all respects upon exactly the same footing.

The court said, page 279:

"It was declared in *Portland Bank* v. *Apthorp, ubi supra*, that taxes of this sort must undoubtedly be equal; that it must operate alike on all persons who exercise a particular employment or enjoy the same privilege or commodity. The same doctrine was affirmed in the recent case of *Commonwealth* v. *Peoples Savings Bank, ubi supra.* The reason is obvious. In the language of the court, an unequal excise would be 'contrary to the principles of justice.' That the excise in question operates unequally in this sense cannot be doubted. It is laid only on a certain class of stockholders, those residing out of the State, leav-

ing all others who enjoy the same privilege and receive a like profit or gain entirely exempt from any similar charge."

This language applies to Patton and to the act of Congress in question with as much force as it applied in the Massachusetts case. It operates on Patton, who bought his tobacco after April 14th, and exempts the man who bought exactly the same tobacco on April 13th, although both Patton and he stand in all respects upon exactly the same footing. This is not equality. It is the rankest injustice and favoritism.

If the Massachusetts court could declare that excise void as being repugnant to first principles, this court should declare this excise void also. It is unequal, and therefore unjust and repugnant to first principles. In *Portland Bank* v. *Apthorp*, 12 Allen 252, Parker, Chief Justice, speaking for the court of an excise upon a business, says:

"Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed. A tax upon one particular monied capital would enquestionably be contrary to the principles of justice, and could not be supported."

The case of *Knowlton* v. *Moore*, 178 U. S. R., is not in conflict with the principle contended for here. The point of that case, as stated by Mr. Justice White, at page 55, quoting from *Magown* v. *Illinois Sav. Co.*, 170 U. S., is that there is no natural right to a legacy, the right to it being created by positive law, and being therefore no more than a privilege conferred by law. It is no right at all then, but a privilege simply derived from the law, and to be exercised upon those conditions only that the law prescribes. Since the law confers the privilege of taking a legacy, it may prescribe the conditions upon which it is to

be received, and it may therefore provide that legacies above $10,000 shall pay a tax, while legacies below $10,000 shall pay none. That case justifies conditions upon which privileges are exercised, but it has no relation to a case in which taxes are imposed upon property already owned by the citizen.

WM. L. ROYALL,
For Plaintiff in Error.

DEFENDANT'S

BRIEF

16

No. 426.

Brf. of Atty. Gen'l. (Boyd) for D.

Filed Jan. 31, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JAMES D. PATTON, TRADING AS J. D. Patton & Co., plaintiff in error,
v.
J. D. BRADY, COLLECTOR OF INTERNAL revenue for the eastern district of Virginia, defendant in error.
No. 426.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

JAS. E. BOYD,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

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J. D. BRADY, COLLECTOR OF INTERNAL revenue for the eastern district of Virginia, defendant in error.

No. 426.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

James D. Patton, the plaintiff in error, is a citizen of the city of Richmond, in the State of Virginia, where he is engaged in business under the firm name of James D. Patton & Co. J. D. Brady, the defendant in error, is a citizen of the city of Petersburg, in the said State of Virginia, and is collector of internal revenue of the United

States for the Second district of Virginia; and both
ton and Brady are residents of the eastern distri
Virginia.

Patton, under his firm name, is a dealer in tob
and in the month of May, 1898, purchased, in the c
of his business, 102,076 pounds of manufactured
bacco. This tobacco had been regularly prepared
market by the manufacturers thereof, and subseque
the 14th of April, 1898, the tax of 6 cents per p
had been paid and internal-revenue stamps to de
such payment affixed to the boxes containing the to
and properly canceled. At the time the act of
gress approved June 13, 1898, entitled "An act to
vide ways and means to meet war and other expe
tures, and for other purposes," went into effect Pa
still had the tobacco above referred to on hand, and
holding it for sale as a tobacco dealer. Patton fail
make return of said tobacco under the provisions o
war-revenue act, and, it being brought to the knowl
of the internal-revenue authorities that he had thi
bacco on hand as a dealer, an assessment was duly
against him for $3,062.28, the tax provided upon to
of this character under the provisions of the war-rev
act, and the payment of the same was demanded of
by Collector Brady, the defendant in error. Pa
paid the amount of tax, as he states in his declara
under protest, and then brought this suit in the ci
court of the United States for the eastern distri
Virginia against Brady, the collector, to recover
money back. The case was disposed of in the ci
court by the following order (Rec., pp. 3 and 4):

Order dismissing case.

In the circuit court of the United States for the eastern district of Virginia.

JAMES D. PATTON, PLAINTIFF,
v.
JAMES D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA, DEFENDANT.

This day came the plaintiff, by his attorney, William L. Royall, and moved the court to take up this case out of its order upon the docket and set a day for the trial thereof.

And thereupon the defendant appeared by Edgar Allan, United States attorney for the eastern district of Virginia, as his attorney, and moved the court, in lieu of setting said case, to dismiss the same because the acts of Congress set out in the declaration are not repugnant to the Constitution of the United States.

Whereupon, on examining the declaration, it appearing that both plaintiff and defendant are citizens of Virginia, and being of opinion that the acts of Congress set out and referred to are constitutional, and there being no further question raised in the pleadings, the court doth order that the motion of the defendant be sustained and the case dismissed, and that the defendant recover of the plaintiff his costs by him expended in and about his defense of this suit.

EDMUND WADDILL, Jr.,
U. S. Judge.

SEPTEMBER 22, 1899.

ARGUMENT.

JURISDICTION.

Has the circuit court of the United States original jurisdiction of the cause of action in this case?

Patton, the plaintiff in error, and Brady, the defendant in error, are both citizens and residents of the State of Virginia and of the eastern judicial district in said State.

The cause of action arose by reason of the collection from Patton by Brady, the collector, of the sum of $3,062.28 as tax on manufactured tobacco which was held by the former as a tobacco dealer. The assessment and collection were made under the provisions of the act of June 13, 1898, known as the war-revenue act. This act does not touch the question of jurisdiction, and consequently we must look to the law as it existed before the war-revenue act went into effect to find whether or not this action can be brought originally in the circuit court.

There is no disagreement about the facts, for the decision of the court below was made upon the averments in the declaration of the plaintiff in error. "*Both plaintiff and defendant are citizens of Virginia*," says Judge Waddill in his order dismissing the suit. (Record, p. 4.) This was one ground upon which the action was dismissed. If this ground is well taken, then the judgment of the lower court will be affirmed.

The act of March 2, 1833 (4 Stat., 632), relating to the jurisdiction of the circuit courts, was amended and made more explicit by section 50 of the act of June 30, 1864 (13 Stat., 241). Then came the act of July 13,

1866 (14 Stat.), which, in section 67 (p. 171), provides, upon the petition of the defendant, for the removal of causes, civil or criminal, brought in the State courts against officers acting under the authority of the internal-revenue laws to the circuit court of the United States of the district for trial. This last-named act, in section 68 (p. 172), expressly repeals section 50 of the act of June 30, 1864, and further directs that any case which had been removed from a State court to a United States court under section 50 of the act of June 30, 1864, should be remanded to the State court from which it was brought, unless such case involved a cause of action which would be removable under the provisions of section 67 of the last act.

So then, the jurisdiction of the circuit courts in original suits between citizens of the same State in internal-revenue cases, made clear by the act of June 30, 1864, was taken away by the act of July 13, 1866. See *Insurance Co.* v. *Ritchie*, 5 Wall., 541; *City of Philadelphia*, v. *Collector*, 5 Wall., 570; *Hornthal* v. *Collector*, 9 Wall., 560; *Assessor* v. *Osborne*, 9 Wall., 567.

And in Gould and Tucker's Notes, new edition, Vol. I, p. 116, it is said:

> The jurisdiction of suits between citizens of the same State in internal-revenue cases, bestowed by acts of March 2, 1833 (4 St., 632), and June 30, 1864 (13 St., 241), was taken away by the act of July 13, 1866 (14 St., 172).

If, therefore, the jurisdiction of the circuit court of the United States in respect to internal-revenue cases has not been restored by some legislation which is still

in force, since the act of 1866, the jurisdiction does not exist.

I assume that it will be contended that this jurisdiction was restored by the last paragraph of subdivision fourth of section 629 of the Revised Statutes of the United States. This subdivision is in the following language:

> Of all suits at law or in equity arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws.

Then came the act of March 3, 1875 (18 Stat., 470). It was held in *Venable* v. *Richards* (105 U. S., 636) that section 643 of the Revised Statutes was not superseded by this act.

The next legislation in order upon this question is the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat., 433). By section 5 of the act last referred to it is expressly provided that the jurisdiction or rights under sections 641, 642, 643, 722, or in Title XXIV of the Revised Statutes of the United States, or in section 8 of the act of Congress of which said act is an amendment, or in the act of Congress approved March 1, 1875, shall not be affected. Then, in section 6 of the act, after naming specific laws which are repealed, all others in conflict with the provisions of the act are repealed.

Thus it will be seen that it is expressly provided by the act of 1887, as corrected in 1888, that section 643

of the Revised Statutes shall not be affected. There is no such saving clause as to section 629 or any portion of it. It is fair to assume, therefore, that section 629 would have been excepted if it had not been the purpose of Congress to repeal it as in conflict with the later statute.

Foster in his Federal Procedure, Vol. I, pages 31 and 32, says that the question of the jurisdiction of the circuit court of the United States in cases of this character (cases arising under internal-revenue laws) under the authorities is a doubtful one, and the act of March 3, 1887, sections 5 and 6, is referred to. This author, however, cites one case in the circuit court—that of *Ames* v. *Hager* (36 Fed. Rep., 129) in which it is held that the jurisdiction still exists. In Gould and Tucker's Notes, new edition, Vol. I, page 116, I find the following:

> Although the language of clause 4 of section 629 seems broad enough to cover any case remotely connected with the revenue laws, yet section 643 seems to indicate the classes of cases thought to come within the designation of cases arising under the revenue laws.

Section 643, it will be remembered, is the section providing for the removal of such causes from the State courts to the circuit court of the United States.

It seems, therefore, to have been the purpose of Congress to definitely determine the jurisdiction of the circuit courts of the United States by the act of March 3, 1887, as corrected and enrolled under the act of 1888, and the effect of this legislation has been to restore the law in reference to the jurisdiction of the circuit courts of the

United States, in causes arising under the internal-revenue laws as it existed prior to the passage of the act of March 3, 1875; in other words, that the law as declared in *Insurance Company* v. *Ritchie* and the other cases before cited, under the act of 1866, is now the law of the land with reference to the jurisdiction of the circuit courts of the United States in internal-revenue cases.

If this contention is well founded, this suit should have been brought in the State court of Virginia, and then, when it was ascertained by the declaration of the plaintiff that his cause of action was founded on an act done by the defendant as collector of internal revenue under the authority of an internal-revenue law of the United States, the case could be removed upon the petition of the defendant at any time before the trial or final hearing to the circuit court of the United States for the district.

Black's Dillon on Removal of Causes, page 5, note 5, referring to the act of March 2, 1833, says: "This statute was afterwards incorporated in the Revised Statutes of the United States, section 643." I also call the attention of the court to the other notes on page 5 of the said work.

My position is, therefore, after considering the legislation upon this subject and the decisions of the courts in reference thereto, that it was the purpose of Congress, and that it is so expressed in the law as it now stands, to leave the jurisdiction in cases arising under the internal-revenue laws where the parties are citizens of the same State in the courts of the State in which the cause of

action arose, and to provide jurisdiction in the circuit courts of the United States only in case the defendant elected to remove the action under the provisions of section 643 of the Revised Statutes.

THE CONSTITUTIONAL QUESTION.

If the court shall conclude that the jurisdiction is properly placed in bringing this suit in the circuit court, then there remains for consideration the question as to whether the act under which the assessment against the plaintiff was made, and the tax, amounting to $3,062.28, was collected, is repugnant to section 8, Article I, of the Constitution of the United States.

The provision of the act involved in the question is the second clause of section 3 of the act of June 13, 1898 (war-revenue act). So much of section 3 as is necessary to be read in order to fully comprehend the question is as follows:

> SEC. 3. That there shall, in lieu of the tax now imposed by law, be levied and collected a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured, and sold, or removed for consumption or sale; and upon cigars and cigarettes which shall be manufactured and sold, or removed for consumption or sale, there shall be levied and collected the following taxes, to be paid by the manufacturer thereof, namely, a tax of three dollars and sixty cents per thousand on cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, and of one dollar per thousand on cigars made of tobacco or any substitute therefor,

and weighing not more than three pounds per thousand; and a tax of three dollars and sixty cents per thousand on cigarettes made of tobacco or any substitute therefor, and weighing more than three pounds per thousand; and one dollar and fifty cents per thousand on cigarettes made of tobacco or any substitute therefor, and weighing not more than three pounds per thousand: *Provided*, That in lieu of the two, three, and four ounce packages of tobacco and snuff now authorized by law, there may be packages thereof containing one and two-thirds ounces, two and one-half ounces, and three and one-third ounces, respectively, and in addition to packages now authorized by law, there may be packages containing one ounce of smoking tobacco.

And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all the articles enumerated in this section which were manufactured, imported, and removed from factory or custom-house before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this act held and intended for sale by any person, a tax equal to one-half the difference between the tax already paid on such articles at the time of removal from the factory or custom-house and the tax levied in this act upon such articles.

Every person having on the day succeeding the date of the passage of this act any of the above-described articles on hand for sale in excess of one thousand pounds of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the

custom-house through which imported, bearing the rate of tax payable thereon at the time of such removal, shall make a full and true return under oath in duplicate of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to the cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Such returns shall be made and delivered to the collector or deputy collector for the proper internal-revenue district within thirty days after the passage of this act. One of said returns shall be retained by the collector and the other forwarded to the Commissioner of Internal Revenue, together with the assessment list for the month in which the return is received, and the Commissioner of Internal Revenue shall assess and collect the taxes found to be due, as other taxes not paid by stamps are assessed and collected.

I shall not undertake to discuss seriatim the propositions of law contended for by the plaintiff in error in the brief filed by his learned counsel. As it appears to me, there is but a single question for the consideration of the court, and that is as to whether the uniformity required by the section of the Constitution above quoted has been observed by Congress in levying the tax on manufactured tobacco provided for in the second paragraph of section 3 of the war-revenue act.

Prior to the act of June 13, 1898, the tax on manufactured tobacco was 6 cents per pound. In lieu of this the said act provides for a tax of 12 cents per pound upon all tobacco, however prepared, manufactured, and sold, or removed for consumption or sale; and under

paragraph 2 of section 3 of the said act, as will be seen, it is further provided that in cases of manufactured tobacco which had been tax paid at the rate of 6 cents per pound under the law as it existed, and which bore tax stamps affixed thereto for the payment of the tax thereon, canceled subsequent to April 14, 1898, a tax in addition to the tax already paid, equal to one-half of the increase made by the first paragraph of the section, should be levied. This made the tax levied upon manufactured tobacco removed from the manufactory and tax paid subsequent to April 14, 1898, and prior to the time that the act of June 13, 1898, went into effect, 9 cents per pound.

So we may say that there can be found, or could have been found recently after the war-revenue act went into effect, in the hands of persons holding it for sale, three several classes of manufactured tobacco, each tax paid at a different rate, viz., tobacco tax paid prior to and including April 14, 1898, on which the tax was 6 cents per pound; tobacco tax paid subsequent to April 14, 1898, and before the war-revenue act went into effect June 13, 1898, on which the tax under the old law of 6 cents per pound and also the additional tax of 3 cents under the new law had been paid, making 9 cents per pound, and tobacco tax paid under the new law, at 12 cents per pound.

The requirement of the Constitution is that duties, imposts, and excises shall be uniform throughout the United States. The uniformity required under this provision of the Constitution has been held to be geographical or territorial only, and that a tax is uniform when it operates with the same force and effect in every place

where the subject of it is found (*Loughborough* v. *Blake*, 5 Wheat., 318; *Head Money Cases*, 112 U. S., 580, 594); and it has also been held that under the power to tax property may be classified for taxation at different rates, and that it is enough that there is no discrimination in favor of one against another of the same class (*Giozza* v. *Tiernan*, 148 U. S., 657).

Under the provisions of the war-revenue act before set forth, manufactured tobacco was classified for taxation. One class consisted of tobacco held for sale which had paid a tax under a previous law, and the other class was tobacco which was manufactured and removed for sale or consumption after the war-revenue law went into effect. Now, this tax was uniform throughout the United States, because it bore equally upon all persons holding tobacco of either class. It is not a new principle in our revenue laws to constitute different classes of the same article in order to levy taxes with respect to the same. Cotton cloth is an article, and yet by reference to tariff acts we find that this article is classified in order to impose different duties upon different classes. For instance, in the act of July 24, 1897 (30 Stat., 151), entitled "An act to provide revenue for the Government and to encourage the industries of the United States," we find, in paragraph 304, Schedule I, page 175, this provision:

> Cotton cloth not bleached, dyed, colored, stained, painted, or printed, and not exceeding fifty threads to the square inch, counting the warp and filling, one cent per square yard; if bleached, one and one-fourth cents per square yard; if dyed, colored, stained, painted, or printed, two cents per square yard.

And in paragraph 305 of the same act we find this provision:

> Cotton cloth, not bleached, dyed, colored, stained, painted, or printed, exceeding fifty and not exceeding one hundred threads to the square inch, counting the warp and filling, and not exceeding six square yards to the pound, one and one-fourth cents per square yard; exceeding six and not exceeding nine square yards to the pound, one and one-half cents per square yard, etc.

The duty imposed under these provisions upon cotton cloth is uniform because it bears equally upon each particular classification of the article. Manufactured tobacco itself may be taken as another illustration, for there are several classes of tobacco prepared for use, all coming under the general head of manufactured tobacco. These consist of what is commonly known as chewing tobacco, which is put up in plugs or cakes; snuff, which is the article in the ground form; and cigars and cigarettes, which are manufactured and prepared for smoking. The taxes levied by the former revenue act and those levied under section 3 of the war-revenue act are different upon these different classes. Cigars and cigarettes are taxed by an entirely different method and at a different rate from that which pertains to other manufactured tobacco, the tax as to the latter being regulated by the pound and the tax upon cigars and cigarettes being based upon the thousand, and even these are classified according to the weight per thousand.

I contend that in pursuance of the principle of classification Congress has the right under the Constitution to provide subjects of taxation by separating an article into

classes and basing the distinction among such classes upon any description which can be generally applied and which will identify a particular class wherever it is found. The present tax on distilled spirits is $1.10 per gallon, but if Congress should see proper to do so, it could classify this subject of taxation and place a different tax on each class. It would fully comply with the requirement for uniformity to place a tax of $1 per gallon on spirits distilled from grain and a tax of $2 per gallon on spirits distilled from fruit. Such a system would be uniform and would apply equally to each class of distilled spirits throughout the United States. Following in this line, I insist that articles may also be classified as to time of manufacture, removal, or as to date when found in warehouses or in the hands of dealers. Under the first section of the war-revenue act the tax on beer, etc., is increased from $1, the then existing tax, to $2 per barrel, with a provision for collecting the additional tax from beer which had paid the $1 but which still remained stored in warehouse. Although the latter is made to pay an additional tax, the subject is so classified as to make uniformity throughout the United States, for it reached beer everywhere on which the $1 per barrel had been paid and which still remained in the warehouse.

Plaintiff in error denounces as unjust the proposition to levy more tax on tobacco which had already been stamped under the provisions of the existing law; but while he complains of the fact that his tobacco has to pay 9 cents, and such as remained in the hands of persons holding the same for sale stamped before and including April 14, 1898, only paid 6 cents, and he was

thus thrown in competition on the market with tobacco bearing a lower rate, he omitted to call attention to the fact that the class of manufactured tobacco immediately following his class and coming upon the market under the first paragraph of section 3 of the war-revenue act had to pay tax at a rate 3 cents per pound higher, namely, at the rate of 12 cents per pound.

It may be regarded as a hardship to pay more taxes than a person has expected to pay, but such occurrences are not unusual. Before the act of August 27, 1894, (28 Stat., 563), the tax on distilled spirits was 90 cents per gallon. Every distiller who operated his distillery expected to stamp his product at 90 cents per gallon. Such product went into the bonded warehouse with the lien of 90 cents per gallon attached as the lawful tax thereon, and yet, by the said act, every gallon of said product found in bond when the last-named act took effect had an increase of 20 cents upon it. The distiller who had paid the tax on his spirits the day before the act of August 27 was approved saved 20 cents per gallon, although it may have been that such spirits had been in bond a greater length of time than the spirts of the distiller who became subject to the increase.

But I will not pursue the subject further than to reiterate that paragraph 2 of section 3 of the war-revenue act has the effect to constitute a class of manufactured tobacco as a subject of taxation, the class including all tobacco *manufactured, imported, and removed from factory or custom-house before June 13, 1898, bearing tax stamps affixed and canceled subsequent to April 14, 1898, and*

which tobacco was on the 13th of June, 1898, held and intended for sale by any person. It was this class of tobacco which the plaintiff in error held, and upon which he was required to pay a tax of 3 cents per pound under the provision of the war-revenue act above cited. Tobacco answering the same description, and consequently of the same class, held by any other person in any part of the United States was subject under the law to the same tax.

In *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 586) Mr. Justice Field filed an opinion in which he held, in speaking of the uniformity of taxation required by the Constitution:

> The uniformity thus required is the uniformity throughout the United States of the duty, impost and excise levied.

In the *Head Money Cases*, before cited, Mr. Justice Miller, for the court, says:

> The tax is uniform when it operates with the same force and effect in *every* place where the subject of it is found.

And in his lectures on the Constitution (N. Y., 1891), pages 240, 241, speaking on the same subject, Mr. Justice Miller declares:

> The tax must be uniform on the *particular article;* and it is uniform, within the meaning of the constitutional requirement, if it is made to bear the *same percentage* over all the United States. * * * The framers of the Constitution could not have meant to say that the Government, in raising its revenues, should not be allowed to discriminate between the *articles* which it should tax.

And further—

> The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word "uniform," which has been adopted, holding that the uniformity must *refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times.* (*Cobb* v. *Comrs.*, 122 N. C., 307.)

There are many other decisions, both Federal and State, in harmony with the above quotations from Justices Field and Miller, but I shall content myself by calling attention to those cited in *Giozza* v. *Tiernan* in support of the opinion of the court in that case.

JAS. E. BOYD,
Assistant Attorney-General.

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MOTION

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

J. D. PATTON, TRADING AS J. D. PATTON & CO.,
v.
J. D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.

No. 16.

The United States, by the Solicitor-General, moves the court to vacate the order of publication entered in the above-entitled case on January 17, 1901, and further moves the court to enter an order dismissing the writ of error in the above-entitled case on the ground and for the reason that said writ of error has abated by the death of the defendant in error, the said J. D. Brady; and the United States assigns the following reasons for said motion:

I.

The said action is one of trespass on the case, and has been instituted, as will appear by the declaration filed therein, to recover damages for the wrongful and unlawful act which the said plaintiff in error alleges the said defendant in error committed during his lifetime, to the injury and damage of said plaintiff in

error. The action is therefore based upon a tort, and as such has abated by reason of the death of said defendant, which death has been formally suggested of record by the plaintiff in error.

II.

The order heretofore granted by this court on January 17, 1901, was entered on the motion of plaintiff in error under rule 15 of the rules of this court, which rule has no application to an action which has abated by the death of one of the parties thereto.

STATEMENT AND ARGUMENT.

The transcript of the record shows that this was an action of trespass on the case instituted in the circuit court for the eastern district of Virginia by one J. D. Patton, trading as J. D. Patton & Co., against J. D. Brady, collector of internal revenue for the second district of Virginia. The plaintiff filed a statement of his claim, which clearly shows the tortious nature of his action. It avers, in substance, that—

"James D. Patton * * * complains of James D. Brady, collector as aforesaid, a citizen of Virginia and a resident of Petersburg, Va., in a plea that he return to him a large sum of money which he has wrongfully and unlawfully *extorted* from him, the said James D. Patton, *together with damages for his wrongful and unlawful act.*"

Then follows a more specific statement of the basis of the claim, by which it appears that "James D. Brady, who is the collector of internal revenue for the

second district of Virginia, in which he and plaintiff reside, and in the month of June, 1898, demanded of plaintiff that he pay the sum of $3,062.28 as an additional tax to be paid upon said tobacco, which he claimed was imposed upon the same by the second paragraph of the third section of said act. Plaintiff refused to pay the same; whereupon the defendant threatened plaintiff that unless he did pay it he would treat plaintiff as a delinquent, and would seize his property under the provisions of an act of Congress applicable to such case, and would sell the same. Under the coercion of this demand and threat plaintiff paid the said sum of $3,062.28 to the defendant, but he did so under protest and with notice to the defendant that he would sue him to recover it back."

Plaintiff then avers that the act of Congress under which the tax was exacted was "repugnant to the Constitution of the United States," and after averring the failure of the Commissioner of Internal Revenue to pay the money thus unlawfully extorted, the statement concludes as follows:

"By all of which acts and doings the plaintiff is damaged six thousand dollars, and therefore he sues."

The court below on motion dismissed the action on the ground that, as both the plaintiff and the defendant were citizens of Virginia, it had no jurisdiction, and that, without respect to the question of jurisdiction, the act of Congress under which the collector exacted the money was constitutional. Thereupon, on October 10, 1899, the plaintiff below sued out this writ of error. It was advanced to be submitted on the 1st day of

February, 1900, on printed briefs, and an oral argument ordered on the 28th day of May, 1900. Pending such oral argument defendant below and defendant in error, J. D. Brady, died on the 30th day of November, 1900. On January 17, 1901, the plaintiff in error suggested the death of the defendant, and moved for an order of publication under Rule 15 to bring in the representatives of the deceased defendant.

This motion is filed to vacate said order on the ground that said Rule 15 has no application to actions which do not survive at law, and also to dismiss the writ of error on the ground that it has abated by defendant's death.

It is clear that the present action sounds in tort. The plaintiff might have waived the alleged tort and sued in assumpsit for money had and received, in which event his right to recover would have been limited to the amount of money which he claims was unlawfully exacted and legal interest. The plaintiff, however, preferred to sue for damages, and while the amount that he paid as a tax was only $3,062.28, he seeks to recover the sum of $6,000 as damages for his (defendant's) wrongful and unlawful act"

It is not important whether the case at bar be treated as arising under the laws of the United States or not, as neither under the Federal statutes nor under the statutes of Virginia, as interpreted by the highest court of that State, is there any right to substitute the personal representatives.

1. If the case is to be treated as arising under the laws of the United States, because the construction of

the Federal Constitution and laws passed thereunder is under consideration, and because the defendant was sued for an act which he did in his official capacity, then the statutes of Virginia have no application, and the action does not survive unless some Federal statute can be cited creating such survivorship or permitting the substitution of personal representatives under Rule 15.

The judiciary act of September 24, 1789, as codified in Revised Statutes, 955, provides:

> When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, *in case the cause of action survives by law*, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is pending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

In the case of *Schreiber* v. *Sharpless* (110 U. S., 76
it was said:

> The personal representatives of a decease
> party to a suit can not prosecute or defend th
> suit after his death unless the cause of actio
> on account of which the suit was brought
> one that survives by law. (Rev. Stat., sec. 955
> At common law, actions on penal statutes d
> not survive (Com. Dig., tit. Administration, I
> 15), and there is no act of Congress whic
> establishes any other rule in respect to action
> on the penal statutes of the United State
> The right to proceed against the representative
> of a deceased person depends not on forms an
> modes of proceeding in a suit, but on th
> nature of the cause of action for which the su
> is brought. If the cause of action survive
> the practice, pleadings, and forms and mode
> of proceeding in the courts of the State ma
> be resorted to in the courts of the Unite
> States for the purpose of keeping the suit aliv
> and bringing in the proper parties. (Rev. Stat
> sec. 914.) But if the cause of action dies wit
> the person the suit abates and can not l
> revived.

That was an action to recover penalties and forfe
tures imposed by an act of Congress for the infringemen
of a copyright. And it was held that no statute of th
State which authorized suits on State penal statutes t
be prosecuted after the death of the offender coul
have any effect on a suit for the recovery of penaltie
under a statute of the United States.

See also *Martin* v. *B. & O. R. R. Co.* (151 U. S., 673
691).

Rule 15 of the Supreme Court does not seek to create rights. It is simply a rule of procedure, and can only govern the method of substituting personal representatives in actions which survive at law. The court did not intend to create by rule of court a survivorship which an act of Congress had expressly refused to create.

If, therefore, the present action arises under the laws of the United States, the statute of Virginia as to the survivorship of actions can have no application. As was said by this court in the quotation above cited, the question of survivorship is not one of procedure, but of right, and if the action arises under the laws of the United States it can not be held to survive in the absence of a Federal statute conferring such right of survivorship.

(2) Even were this not the case, the action would not survive at law under the law of Virginia. The only statute of that State to which my attention has been called which might seem to create a survivorship is section 2655 of the Code, which provides that—

> an action of trespass on the case may be maintained against a personal representative for the taking or carrying away of goods; or for waste or destruction of, or damage to any estate of, or by, his decedent.

This section, being in derogation of the common law, must be strictly construed, and only applies to cases that are strictly within its terms. It is submitted that an action to *recover damages for official extortion by a tax collector* is not an action "for the taking or carry-

ing away of goods, or for waste or destruction of, or damage to any estate of, or by, his decedent."

This is the view taken by the supreme court of appeals of Virginia in the case of *Anderson* v. *Hygeia Hotel Co.* (92 Va., 687).

It will be perceived by reference to this case that the right of an individual to sue for injury to his person was limited to one year. It was contended for the personal representative that in case of death the action survived to the personal representative. The court, however, says (p. 694):

> The act does not affect the rule of the common law, and does not cause to survive, within the meaning of section 2927, the right of action for injury to a person by *wrongful act*, neglect, or default of another. Such right of action still, as at common law, dies with the person, and the limitation of one year applies in such case.

The same court has directly construed section 2655 (*Mumpower* v. *City of Bristol*, 94 Va., 739, 740). In this case an action was brought against the defendant for maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended. It was claimed here that this was a claim for an injury to property, and that in case of death the cause of action would survive to the personal representative. But the court held otherwise, and declared that—

> the damages allowed to be recovered by or against a personal representative by section

> 2655 of the Code are *direct damages to property*, and not those which are merely consequent upon a wrongful act to the person only. *Mumpower* v. *City of Bristol* (94 Va., 739, 740).

In reaching the conclusion that the case just referred to did not come within the meaning of section 2655 of the Code, Judge Keith, president of the court, in delivering the opinion, says:

> The wrongful act which the defendant is alleged to have committed, and for the injury resulting from which the plaintiff sues, consisted in maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended. It is quite obvious that this injunction did not operate to take or carry away the goods of the plaintiff, nor cause the waste or destruction of, or inflict any damage upon, the estate of the plaintiff. It is true that the language of the statute is comprehensive, and embraces damage of any kind or degree to the estate, real or personal, of the person aggrieved; but the damage must be direct, and not the consequential injury or loss to the estate which flows from a wrongful act directly affecting the person only. No part of the defendant's property was taken or carried away; no part of it was wasted or destroyed. The plaintiff's use of his property, and not the property itself, was affected by the act of which he complains.

In *Birmingham* v. *Chesapeake and Ohio Railway Company* (decided September 20, 1900), 2 Virginia Su-

preme Court Reporter No. 14, page 465, the supreme court of Virginia again passed upon the subject. The court describes this action as one "of trespass on the case in assumpsit brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant."

The court say:

> The limitation is not determined by the form of action, but by its object. If the thing complained of is an injury to the person, the limitation in assumpsit is the same as if the action were in form ex delicto. "Whenever the injury is merely personal, whether resulting from breach of contract or from tort, the maxim, *actio personalis moritur cum persona*, prevails." (*Grubb* v. *Sult*, 32 Gratt., 203.)

In that case it was sought to recover as special damages the sum of $100 which the plaintiff claimed to have paid on account of his injuries, but it was held that this claim for money expended did not make the case less a tort.

Similarly in the case at bar, the fact that the plaintiff sues in part to recover taxes actually paid does not cause the case to sound less in tort. *The gravamen of the action was a wrongful and unlawful act of extortion, for which not only the money paid is demanded, but damages by reason of the act of extortion.* There is no suggestion of an implied contract. The tort is the very essence of the suit, and it is now too late, in order to avoid the consequences, to convert the action

into one of assumpsit, even though assumpsit might have originally been brought by a waiver of the tort.

Respectfully,

JOHN K. RICHARDS,
Solicitor-General.

JAMES M. BECK,
Assistant Attorney-General.

DEFENDANT'S

BRIEF

No. 16.

(By of Atty. Gen.l (Dept
for D. C.

Filed Nov. 21, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

J. D. PATTON, TRADING AS J. D. Patton & Co.,
v.
J. D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA. } No. 16.

BRIEF FOR DEFENDANT IN ERROR ON REARGUMENT.

JAMES M. BECK,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

J. D. PATTON, TRADING AS J. D. Patton & Co.,
v.
J. D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA.
No. 16.

BRIEF FOR DEFENDANT IN ERROR ON REARGUMENT.

STATEMENT OF THE CASE.

This is a reargument of a case which was originally submitted on briefs in this court on February 1, 1900. The court, on May 28, 1900, restored the case to the docket for reargument. Before such oral argument took place the defendant below, and defendant in error, J. D. Brady, died on the 30th day of November, 1900. On January 17, 1901, the plaintiff in error suggested the death of the defendant and moved for an order of publication under Rule 15 to bring in the representatives of the deceased defendant. Thereupon, on the 15th day of October, 1901, the United States moved the court to vacate the order of publication entered in

the above-entitled case on January 17, 1901, and to enter an order dismissing the writ of error, on the ground and for the reason that said writ of error has abated by the death of the defendant in error, said J. D. Brady; and the United States assigned the following reasons for said motion:

(1) The said action is one of trespass on the case, and has been instituted, as will appear by the declaration filed therein, to recover damages for the wrongful and unlawful act which the said plaintiff in error alleges the said defendant in error committed during his lifetime, to the injury and damage of said plaintiff in error. The action is therefore based upon a tort, and as such has abated by reason of the death of said defendant, which death has been formally suggested of record by the plaintiff in error.

(2) The order heretofore granted by this court on January 17, 1901, was entered on the motion of plaintiff in error under rule 15 of the rules of this court, which rule has no application to an action which has abated by the death of one of the parties thereto.

Thereupon, on October 21, 1901, this court made an order postponing defendant's motions to vacate order of publication and to dismiss the writ until the hearing of the cause on its merits.

Thereupon, on November 4, 1901, Maggie A. Brady, executrix of J. D. Brady, deceased, was substituted as party defendant in error, without prejudice, etc.

The case arose on the following facts:

At the time of the institution of this suit, James D. Patton, the plaintiff in error, was a citizen of the city

of Richmond, in the State of Virginia, where he was engaged in business under the firm name of James D. Patton & Co. J. D. Brady, the defendant in error, was a citizen of the city of Petersburg, in the said State of Virginia, and was collector of internal revenue of the United States for the second district of Virginia, and both Patton and Brady were residents of the eastern district of Virginia.

Patton, under his firm name, was a dealer in tobacco, and in the month of May, 1898, purchased, in the course of his business, 102,076 pounds of manufactured tobacco. This tobacco had been regularly prepared for market by the manufacturers thereof, and subsequent to the 14th of April, 1898, the tax of 6 cents per pound had been paid and internal-revenue stamps to denote such payment affixed to the boxes containing the tobacco and properly canceled.

At the time the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war and other expenditures and for other purposes," went into effect Patton still had the tobacco above referred to on hand, and was holding it for sale as a tobacco dealer. Patton failed to make return of said tobacco under the provisions of the war-revenue act, and, it being brought to the knowledge of the internal-revenue authorities that he had this tobacco on hand as a dealer, an assessment was duly made against him for $3,162.28, the tax provided upon tobacco of this character under the provisions of the war-revenue act, and the payment of the same was demanded of him

by Collector Brady, the defendant in error. Patton paid the amount of tax, as he states in his declaration, under protest, and then brought this suit in the circuit court of the United States for the eastern district of Virginia against Brady, the collector, to recover the money back, and to recover damages for an alleged "wrongful and unlawful act."

The court, on motion of defendant, dismissed the suit, holding that it was without jurisdiction and that the tax was valid.

ARGUMENT.

Three questions are raised by this appeal:

(1) Has the action survived as against the personal representatives of the deceased defendant in error?

(2) Had the circuit court of the United States original jurisdiction of the cause of action in this case?

(3) Was the tax imposed upon the tobacco of the plaintiff in error valid under the Constitution?

I.

HAS THE ACTION SURVIVED AS AGAINST THE PERSONAL REPRESENTATIVES OF THE DECEASED DEFENDANT IN ERROR.

The transcript of the record shows that this was an action of trespass on the case instituted in the circuit court for the eastern district of Virginia by one J. D. Patton, trading as J. D. Patton & Co., against J. D. Brady, collector of internal revenue for the second district of Virginia. The plaintiff filed a statement of

his claim, which clearly shows the tortious nature of his action. It avers, in substance, that—

> James D. Patton * * * complains of James D. Brady, collector as aforesaid, a citizen of Virginia and a resident of Petersburg, Va., in a plea that he return to him a large sum of money which he has wrongfully and unlawfully *extorted* from him, the said James D. Patton, *together with damages for his wrongful and unlawful act.*

Then follows a more specific statement of the basis of the claim, by which it appears that "James D. Brady, who is the collector of internal revenue for the second district of Virginia, in which he and plaintiff reside, and in the month of June, 1898, demanded of plaintiff that he pay the sum of $3,062.28 as an additional tax to be paid upon said tobacco, which he claimed was imposed upon the same by the second paragraph of the third section of said act. Plaintiff refused to pay the same, whereupon the defendant threatened plaintiff that unless he did pay it he would treat plaintiff as a delinquent, and would seize his property under the provisions of an act of Congress applicable to such case, and would sell the same. Under the coercion of this demand and threat plaintiff paid the said sum of $3,062.28 to the defendant, but he did so under protest and with notice to the defendant that he would sue him to recover it back."

Plaintiff then avers that the act of Congress under which the tax was exacted was "repugnant to the Constitution of the United States," and after averring the

failure of the Commissioner of Internal Revenue to pay the money thus unlawfully extorted, the statement concludes as follows:

> By all of which acts and doings the plaintiff is damaged six thousand dollars, and therefore he sues.

This motion is filed to vacate said order and dismiss the writ of error on the ground that said Rule 15 has no application to such actions, as they do not survive against the personal representatives of the deceased defendant.

It is clear that the present action sounds in tort. The plaintiff might have waived the alleged tort and sued in assumpsit for money had and received, in which event his right to recover would have been limited to the amount of money which he claims was unlawfully exacted, and legal interest. The plaintiff, however, preferred to sue for damages, and while the amount that he paid as a tax was only $3,062.28, he seeks to recover the sum of $6,000 as damages for his (defendant's) "wrongful and unlawful act."

It is not important whether the case at bar be treated as arising under the laws of the United States or not, as neither under the Federal statutes nor under the statutes of Virginia, as interpreted by the highest court of that State, is there any right to substitute the personal representatives.

(1) If the case be treated as arising under the laws of the United States, because the construction of the Federal Constitution and laws passed thereunder is

under consideration, and because the defendant was sued for an act which he did in his official capacity, then the statutes of Virginia have no application, and the action does not survive unless some Federal statute can be cited creating such survivorship or permitting the substitution of personal representatives under Rule 15.

The judiciary act of September 24, 1789, as codified in Revised Statutes, 955, provides:

> When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, *in case the cause of action survives by law*, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is pending twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court.

In the case of *Schreiber* v. *Sharpless* (110 U. S., 76) it was said:

> The personal representatives of a deceased party to a suit can not prosecute or defend the suit after his death unless the cause of action on account of which the suit was brought is one that survives by law. (Rev. Stat., sec. 955.) At common law, actions on penal statutes do not survive (Com. Dig., tit. Administration, B. 15), and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the State may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. (Rev. Stat., sec. 914.) But if the cause of action dies with the person the suit abates and can not be revived.

That was an action to recover penalties and forfeitures imposed by an act of Congress for the infringement of a copyright. It was held that no statute of the State which authorized suits on State penal statutes to be prosecuted after the death of the offender could have any effect on a suit for the recovery of penalties under a statute of the United States.

See also *Martin* v. *B. & O. R. R. Co.* (151 U. S., 673, 691).

Rule 15 of the Supreme Court does not seek to create rights. It is simply a rule of procedure, and can only govern the method of substituting personal representatives in actions which survive at law. The court did not intend to create by rule of court a survivorship which an act of Congress had expressly refused to create.

If, therefore, the present action arises under the laws of the United States, the statute of Virginia as to the survivorship of actions can have no application. As was said by this court in the quotation above cited, the question of survivorship is not one of procedure, but of right, and if the action arises under the laws of the United States it can not be held to survive in the absence of a Federal statute conferring such right of survivorship.

(2) Even were this not the case, the action would not survive at law under the law of Virginia. The only statute of that State to which my attention has been called which might seem to create a survivorship is section 2655 of the Code, which provides that—

> an action of trespass on the case may be maintained against a personal representative for the taking or carrying away of goods, or for waste or destruction of, or damage to any estate of, or by his decedent.

This section, being in derogation of the common law, must be strictly construed, and only applies to cases that are strictly within its terms. It is submitted that an action to *recover damages for official extortion by a*

tax collector is not an action "for the taking or carrying away of goods, or for waste or destruction of, or damage to any estate of, or by, his decedent."

This is the view taken by the supreme court of appeals of Virginia in the case of *Anderson* v. *Hygeia Hotel Co.* (92 Va., 687).

It will be perceived by reference to this case that the right of an individual to sue for injury to his person was limited to one year. It was contended for the personal representative that in case of death the action survived to the personal representative. The court, however, says (p. 694):

> The act does not affect the rule of the common law, and does not cause to survive, within the meaning of section 2927, the right of action for injury to a person by *wrongful act*, neglect, or default of another. Such right of action still, as at common law, dies with the person, and the limitation of one year applies in such case.

The same court has directly construed section 2655 (*Mumpower* v. *City of Bristol*, 94 Va., 739, 740). In this case an action was brought against the defendant for maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended. It was claimed here that this was a claim for an injury to property, and that in case of death the cause of action would survive to the personal representative. But the court held otherwise, and declared that—

> the damages allowed to be recovered by or against a personal representative by section

> 2655 of the Code are *direct damages to property*, and not those which are merely consequent upon a wrongful act to the person only. (*Mumpower* v. *City of Bristol*, 94 Va., 739, 740.)

In reaching the conclusion that the case just referred to did not come within the meaning of section 2655 of the Code, Judge Keith, president of the court, in delivering the opinion, says:

> The wrongful act which the defendant is alleged to have committed, and for the injury resulting from which the plaintiff sues, consisted in maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended. It is quite obvious that this injunction did not operate to take or carry away the goods of the plaintiff, nor cause the waste or destruction of, or inflict any damage upon, the estate of the plaintiff. It is true that the language of the statute is comprehensive, and embraces damage of any kind or degree to the estate, real or personal, of the person aggrieved; but the damage must be direct, and not the consequential injury or loss to the estate which flows from a wrongful act directly affecting the person only. No part of the defendant's property was taken or carried away; no part of it was wasted or destroyed. The plaintiff's use of his property, and not the property itself, was affected by the act of which he complains.

In *Birmingham* v. *Chesapeake and Ohio Railway Company* (decided September 20, 1900), **2** Virginia Supreme Court Reporter, No. 14, page 465, the supreme

court of Virginia again passed upon the subject. The court describes this action as one "of trespass on the case, in assumpsit, brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant."

The court says:

> The limitation is not determined by the form of action, but by its object. If the thing complained of is an injury to the person, the limitation in assumpsit is the same as if the action were in form ex delicto. "Whenever the injury is merely personal, whether resulting from breach of contract or from tort, the maxim, *actio personalis moritur cum persona*, prevails." (*Grubb* v. *Sult*, 32 Gratt., 203.)

In that case it was sought to recover as special damages the sum of $100 which the plaintiff claimed to have paid on account of his injuries, but it was held that this claim for money expended did not make the case less a tort.

Similarly in the case at bar, the fact that the plaintiff sues in part to recover taxes actually paid does not cause the case to sound less in tort. *The gravamen of the action was a wrongful and unlawful act of extortion, for which not only the money paid is demanded, but damages by reason of the act of extortion.* There is no suggestion of an implied contract. The tort is the very essence of the suit, and it is now too late, in order to avoid the consequences, to convert the action into one of assumpsit, even though assumpsit might have originally been brought by a waiver of the tort.

II.

HAD THE CIRCUIT COURT OF THE UNITED STATES ORIGINAL JURISDICTION OF THE CAUSE OF ACTION IN THIS CASE?

This question has already been fully discussed in the brief submitted to the court by my predecessor, Assistant Attorney-General Boyd. No useful purpose would be subserved by a restatement of his position, and I therefore submit the question on the brief filed by him.

III.

WAS THE TAX IMPOSED UPON THE TOBACCO OF THE PLAINTIFF IN ERROR VALID UNDER THE CONSTITUTION?

Before citing the salient provisions of the act under consideration, the court may wish a reference to the tax statutes to which it was an amendment.

Section 3358, R. S., provided as follows:

> Upon tobacco and snuff manufactured and sold, or removed for consumption or use, there shall be levied and collected the following taxes: * * *
>
> On all chewing and smoking tobacco, fine-cut, cavendish, plug, or twist, cut or granulated, of every description; on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened; and on all fine-cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco, a tax of twelve cents per pound.

This act was amended by section 30, of the tariff act of October 1, 1890 (26 Stat. L., 619), as follows:

> That on and after the first day of January, eighteen hundred and ninety-one, the internal taxes on smoking and manufactured tobacco shall be six cents per pound, and on snuff six cents per pound.

The anticipated burdens of the Spanish-American war led Congress to pass the war-revenue act of June 13, 1898, which is now under construction, which, so far as pertinent to the case at bar, provides as follows:

> SEC. 3. That there shall, in lieu of the tax now imposed by law, be levied and collected a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured, and sold, or removed for consumption or sale; * * *
>
> And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all the articles enumerated in this section which were manufactured, imported and removed from factory or custom-house before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, *and which articles were at the time of the passage of this act held and intended for sale by any person*, a tax equal to one-half the difference between the tax already paid on such articles at the time of removal from the factory or custom-house and the tax levied in this act upon such articles.

> Every person having on the day succeeding the date of the passage of this act any of the above-described articles on hand for sale in excess of one thousand pounds of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the custom-house through which imported, bearing the rate of tax payable thereon at the time of such removal, shall make a full and true return, under oath, in duplicate, of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to the cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. * * *

Prior to the act of June 13, 1898, the tax on manufactured tobacco was 6 cents per pound. In lieu of this the act of 1898 provides for a tax of 12 cents per pound upon all tobacco, however prepared, manufactured, and sold, or removed for consumption or sale; and under paragraph 2 of section 3 of the said act it is further provided that in cases of manufactured tobacco which had been tax paid at the rate of 6 cents per pound under the law as it existed, and which bore tax stamps affixed thereto for the payment of the tax thereon, canceled subsequent to April 14, 1898, a tax in addition to the tax already paid, equal to one-half of the increase made by the first paragraph of the section, should be levied. This made the tax levied upon manufactured tobacco removed from the manufactory and tax paid subsequent to April 14, 1898, and

prior to the time that the act of June 13, 1898, went into effect, 9 cents per pound. The act went into effect the day succeeding its passage (sec. 51).

After the war-revenue act went into effect, there were, in the hands of persons holding it for sale, three several classes of manufactured tobacco, each liable to pay a tax at a different rate, viz, (1) tobacco tax paid prior to and including April 14, 1898, on which the tax was 6 cents per pound; (2) tobacco tax paid subsequent to April 14, 1898, and before the war-revenue act went into effect, June 13, 1898, on which the tax under the old law of 6 cents per pound, and also the additional tax of 3 cents under the new law had been paid, making 9 cents per pound; and (3) tobacco tax paid under the new law at 12 cents per pound.

Before discussing the validity of the present tax it is important to determine its character. If it be a direct tax, it is invalid for want of apportionment. If indirect tax, as, for example, an excise, then apportionment is not necessary, and only uniformity is required. The learned counsel for plaintiff in error are not agreed as to the nature of the tax. Mr. Royall, in his brief, argues that it is an excise duty, and in this I entirely concur. Messrs. Daniel & Harper, however, in their brief, claim that it is a direct tax. Only my respect for any position which counsel of their eminence in political and public life may take leads me to discuss the nature of the tax, for it seems to me almost too plain for argument that the tax is the ordinary form of an excise duty. If it be not, then every excise duty that

has been laid since the beginning of the Government and sustained by the courts as such, has been unconstitutional for want of apportionment.

As was said by the Chief Justice in the income-tax cases, the act of June 13, 1898, must be considered as a whole, and so regarded it provides for an elaborate system of excise duties, in conformity with legislative precedents which have existed since the beginning of this Republic, and antecedently in England and other countries. Omitting reference to earlier legislation, the present internal-revenue system was created by the revenue act of July 1, 1862, which became the basis of all later excise legislation, and which imposed duties upon all manner of occupations. Under the war-revenue act of June 13, 1898, many new excise duties were created or revived and existing excise duties were increased upon dealers in liquor and tobacco. The tax now under consideration is a part of these excise duties and simply provides, so far as is pertinent to the present question, that any person who, at the time of the passage of said act, "held and intended for sale" tobacco which had been manufactured, imported, and removed from factory or custom-house before the passage of the act, and which bore tax stamps affixed to said articles for the payment of the taxes thereon, and which stamps had been canceled subsequent to April 14, 1898, should pay an additional duty of 3 cents per pound thereon.

The present duty, therefore, is not a duty imposed upon the plaintiff's personal property, invested or otherwise, or the income thereof, but is a duty imposed upon

certain merchandise, the privilege to sell which is subjected to an additional tax. That this is an excise seems clear.

What a direct tax is was elaborately discussed by this court in the *Income-tax cases* (157 U. S., 429; 158 U. S., 601). This court, while holding that "a tax upon one's whole income is a tax upon the annual receipts from his whole property," and was therefore direct, even when the income was the increment of "capital in personalty," yet directly disclaimed the suggestion that a tax on the "gains or profits from business, privileges, or employments," was a direct tax A few excerpts from the opinion of the Chief Justice demonstrate this fact.

He says (p. 618):

> We are now permitted to broaden the field of inquiry and to determine to which of the two great classes a tax upon a person's *entire* income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of *all* the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct tax, but an indirect tax, in the meaning of the Constitution.

He cites the following definitions with approval (p. 622):

> Cooley (On Taxation, p. 3) says that the word "duty" ordinarily "means an indirect tax imposed on the importation, exportation, or con-

> sumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax, tribute, or duty, but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

He then quotes Hamilton, in the thirty-sixth number of the Federalist, as follows (p. 624):

> The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the direct and those of the indirect kind. * * * As to the latter, *by which must be understood duties and excises on articles of consumption*, one is at a loss to conceive what can be the nature of the difficulties apprehended.

He further quotes Hamilton's argument in the Hylton case:

> The following are presumed to be the only direct taxes: Capitation or poll taxes; taxes on lands and buildings; general assessments, whether on the *whole* property of individuals or on their *whole* real or personal estate. *All else must of necessity be considered as indirect taxes.*

As to this definition the Chief Justice says (p. 625):

> He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's *whole* income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax

> upon that property, and is a direct tax, in the meaning of the Constitution.

After some discussion of the Hylton case the Chief Justice continues as follows (p. 628):

> Nor can we perceive any ground why the same reasoning does not apply to capital in personalty *held for the purpose of income or ordinarily yielding income* and to the income therefrom.

To exclude the suggestion that a tax on invested personalty included an excise tax on personalty intended for consumption or sale, the court further say (p. 635):

> *We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.*

In the opinion of the court, Mr. Chief Justice Fuller thus defines direct taxes (157 U. S., 558):

> Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes.

On the first hearing of the case Mr. Justice Field thus defined excises (p. 592):

> Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. The taxes created by the law under consideration as applied to savings banks, insurance companies (whether of fire, life, or marine), to building or other associations, or to the conduct of any other kind of business are excise taxes and fall within the requirement, so far as they are laid by Congress, that they must be uniform throughout the United States.

One of the clearest statements of the distinction between direct and indirect taxes was made on the argument of the income-tax cases by ex-Senator Edmunds, as follows:

> A direct tax is a tax upon every kind of property and upon every kind of person in respect of himself or in respect of his property, either in existence or acquired or to be acquired, and not in respect to his voluntary calling, pursuit, or acts, as importing goods which he may import or not import as he pleases—not in respect of his being a trader or manufacturer, etc.—in all of which cases he is taxed as a consequence of his free choice of business, and in all of which the burden is to some degree moved on—but in respect to things that belong to the existence of property as an entity—a state of physical being.

> Duties, imposts, and excises, are, in large degree, and almost universally, heavy or light upon each person, depending upon his own will.
>
> * * * * *
>
> Mr. Justice BROWN. Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.
>
> Mr. EDMUNDS. Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement.

In another place (p. 487) Mr. Edmunds speaks of indirect taxes as those "which are intended to fall upon the movement of commodities and the voluntary occupations of men."

The scope of the decision was further explained by this court in *Knowlton* v. *Moore* (178 U. S., 82):

> It is true that in the income-tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word "direct" was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment,

two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts, and excises, which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.

This seems to me to dispose of the line of cases from *Brown* v. *Maryland*, 12 Wheat., 419, 444; *Almy* v. *California*, 24 Howard, 169; *Cook* v. *Pennsylvania*, 97 U. S., 566; *Fairbank* v. *United States*, 181 U. S., 283, and similar cases, in which the tax on the sale of an article is held to be identical with a tax on the article itself. They have reference to other clauses of the Constitution, and turn upon the question of interference with interstate or foreign commerce. They do not affect the questions of apportionment and uniformity within the taxing clauses of the Constitution.

It seems clear to me, therefore, that the present tax is a tax upon a tobacco dealer with respect to the intended

sale of a staple commodity, and as such is an excise, and therefore an indirect tax. It is true that the act refers to "any person," but it is clear from the entire act that tobacco dealers were in the mind of Congress. Whether this be so or not, it is clearly a tax levied with reference to sales, and as such an excise duty. To hold otherwise would be to uproot the entire revenue system as it has existed from the formation of the Republic.

The tax being an indirect tax, no apportionment was necessary. It remains to inquire whether the tax is void for want of uniformity.

TAX NOT VOID FOR WANT OF UNIFORMITY.

And here again only my respect for the eminence of counsel for the appellant leads me to discuss a question which otherwise I should have regarded as settled beyond controversy by the decision in *Knowlton* v. *Moore* (*supra*). In that case this court held, without any dissent, as follows (p. 106):

> By the result, then, of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. And it also results that the assertion to which we at the outset referred, that the decision in the *Head Money cases*, holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports,

> is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated as respected their operation, as one and the same thing, and embodied the same conception.

The decision in the *Head Money cases* (112 U. S., 585, 594), referred to by Mr. Justice White, the authority of which is affirmed, is as follows:

> The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform, and operates precisely alike in every port of the United States where such passengers can be landed. * * * Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (*State Railroad Tax cases*, 92 U. S., 575, 612.) Here there is substantial uniformity within the meaning and purpose of the Constitution.

Tested by this standard there can be no question that the tax now under consideration is uniform, for wherever throughout the United States tobacco is found in the possession of a person who intends to sell it, and having tax-paid stamps canceled of a certain date, the tax in question will fall upon it. No preference is given to any locality or to any person.

It is, however, argued that because an excise has already been imposed upon this tobacco that an additional duty may not be levied thereon. For this proposition no authority is cited, and I confidently submit none can be. The power to tax which the Constitution confers upon the Federal Government is sweeping and universal, and is subject to no limitation except such as are provided for in the Constitution. Its extent is well described by Mr. Chief Justice Chase, speaking for the court, in the *License Tax cases* (5 Wall., 462, 471):

> The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject and may be exercised at discretion.

And again by Mr. Justice Swayne, speaking for the court, in *Pacific Insurance Co.* v. *Soule* (7 Wall., 433, p. 443):

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

The Constitution in no respect forbids double taxation, and therefore there is no limit to the number of times that property can be taxed. This rests wholly within the discretion of the taxing power. If it be argued that duplicated taxation could amount to confiscation, then I reply that all taxation is confiscation *pro tanto.* It takes without consent, and the amount it takes rests in the exclusive discretion of the taxing power.

Much vigorous language is used by the plaintiff in error in denunciation of the alleged injustice of this tax. Complaint is made that his tobacco has to pay 9 cents, while such as remained in the hands of the persons holding the same for sale stamped before April 14, 1898, only pay 6 cents, and he was thus thrown in competition in the market with tobacco bearing a lower rate.

He, however, omits to state that he has an advantage to the extent of 3 cents per pound over those who are obliged to pay 12 cents per pound.

However, such discussion seems idle, as this court has no concern either with the wisdom or abstract justice or injustice of the tax in question. It is enough that Congress in adopting a scheme of classification imposed a tax upon tobacco of a certain class, and there is no dispute that the tobacco of the plaintiff in error fell within this class.

It is finally suggested by the plaintiff in error that this tax is in the nature of an *ex post facto* punishment, and therefore unconstitutional. If this be so, every

tax which is made to fall upon property which existed prior to the passage of the act, or whose classification depends upon conditions which were antecedent to such passage, is invalid. This would be a remarkable conclusion for this court to reach, and its consequences are inconceivable. Naturally, every tax act since the foundation of the Government has been levied with reference to conditions antecedent to its passage; in fact, these conditions determine the method of classification and the amount of the tax. To declare that such a tax is in effect an *ex post facto* penalty is, I venture to say, as extraordinary a proposition as has ever been submitted to the court in its history.

I can assent to the vigor, spirit, and eloquence with which the brief of Senator Daniel is written without assenting in any respect to the soundness of his propositions. It is always easy for eloquent counsel to take a tax law and rhetorically tear it to pieces. The war-revenue act being a comprehensive measure, and one adopted to meet an immediate emergency, is doubtless subject to considerable criticism as to some of its provisions, but such criticism would find a more appropriate audience in the Congress of the United States, which makes and repeals laws, than in the Supreme Court, which simply interprets them.

I am prompted to conclude with the words of this court in *Nicol* v. *Ames* (173 U. S., 509), which reviewed the war-revenue act, and held it to be constitutional with respect to the stamp tax on agreements and memoranda of stock sales. The court says (p. 514):

It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

And again (p. 515):

But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in

for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

JAMES M. BECK,
Assistant Attorney-General

O

No. 16.

Sup. Ct. of Atty. Gen. Opinion for Appellee.

Filed Dec. 12, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

J. D. PATTON, TRADING AS J. D. PATTON & Co.,
v.
J. D. BRADY, COLLECTOR OF INTERNAL REVENUE for the second district of Virginia. } No. 16.

SUPPLEMENTAL BRIEF FOR APPELLEE.

JAMES M. BECK,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

J. D. PATTON, TRADING AS J. D. PATTON & CO.,
v.
J. D. BRADY, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF VIRGINIA. | No. 16.

SUPPLEMENTAL BRIEF FOR APPELLEE.

The statute to which I called the attention of the court on the oral argument will be found in 30 Statutes at Large, page 822, and is as follows:

CHAP. 121. An act to prevent the abatement of certain actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no suit, action, or other proceeding lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death or the expiration of his term of office, or his retirement or resignation or removal from office, but, in such event the court, on motion or supplemental petition filed at any time within twelve months thereafter showing a necessity for the

survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs.

Approved, February 8, 1899.

This statute must be read as a whole. On the theory of *inclusio unius est exclusio alterius*, all actions sounding in tort are abated by the death of a party litigant, unless the specific method provided by said statute is followed. The act clearly provides that the survivorship of the action shall not be a matter of strict right, but shall rest in the sound discretion of the court, which on cause shown may revive it. The action is not revived against the personal representatives of the deceased litigant. It only survives as against, or in favor of, a deceased Government official, and the suit may be maintained under the statute by or against his successor in office, but not against his personal representatives.

Counsel for appellant in the present case did not follow the statute, but preferred to proceed against the personal representatives of the deceased collector of internal revenue, and it is respectfully submitted that not only is there no Federal statute authorizing such procedure, but the act of Congress above cited, by implication, excludes the course adopted by the appellant.

Respectfully,

JAMES M. BECK,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 16.—October Term, 1901.

James D. Patton, trading as J. D. Patton & Co., Plaintiff in Error,
vs.
Maggie A. Brady, Executrix of J. D. Brady, Collector of Internal Revenue for the Second District of Virginia.

In error to the Circuit Court of the United States for the Eastern District of Virginia.

[March 17, 1902.]

On July 14, 1899, plaintiff in error, as plaintiff below, commenced this action in the Circuit Court for the Eastern District of Virginia against J. D. Brady, collector of internal revenue for the second district of Virginia. In his declaration he alleged that in May, 1898, he had purchased in the open market and in the regular course of business 102,076 pounds of manufactured tobacco; that all the requisites of the internal revenue laws of the United States then existing had been fully complied with, stamps placed upon the boxes containing the tobacco, and regularly and duly canceled subsequent to April 14, 1898, and the tobacco removed from the factory, and that when he made his purchase the entire tax due the United States under and by virtue of such laws had been paid. The declaration then proceeded:

"After the act of Congress approved June 13, 1898, entitled 'An act to provide ways and means to meet war and other expenditures, and for other purposes,' had been enacted, the defendant, James D. Brady, who is the collector of internal revenue for the second district of the State of Virginia, in which he and plaintiff reside, and in the month of June, 1898, demanded of plaintiff that he pay the sum of $3,062.28 as an additional tax to be paid upon said tobacco, which he claimed was imposed upon the same by the second paragraph of the third section of said act. Plaintiff refused to pay the same; whereupon the defendant threatened plaintiff that unless he did pay it he would treat plaintiff as a delinquent, and would seize his property under the provisions of an act of Congress applicable to such case, and would sell the same. Under the coercion of this demand and threat plaintiff paid the sum of $3,062.28 to the defendant, but he did so under protest and with notice to the defendant that he would sue him to recover it back.

"Plaintiff avers that said section 3 of said act of June 13, 1898, imposing said additional tax upon his tobacco is repugnant to the Constitution of the United States, and said acts of Congress authorizing the defendant to seize plaintiff's property and sell it if he did not pay the same are also repugnant to said Constitution, and that his suit therefore arises under the Constitution of the United States.

"On the 17th day of June, 1899, the plaintiff set out all of the foregoing facts in an application to the Commissioner of Internal Revenue of the United States, according to the laws in that regard and the regulations of the Secretary of the United States established in pursuance thereof, and he appealed to said Commissioner of Internal Revenue to have said money so unlawfully extorted from him returned to him; but said Commissioner of Internal Revenue on the — day of July, 1899, rejected said appeal and refused to direct said money to be returned to plaintiff. The said Commissioner did not reject said appeal because of any informality in the manner in which it was made, but because he was of opinion that said act of Congress imposing said tax was consistent with the Constitution of the United States, and that said tax was lawfully collected; by all of which acts and doings the plaintiff is damaged six thousand dollars, and therefore he sues."

Summons having been served the case came on for hearing on the motion of the United States attorney for the district to dismiss the action on the ground that the act of Congress set forth in the declaration was not repugnant to the Constitution of the United States, which motion was sustained, and on September 22, 1899, the action was dismissed. To review such ruling plaintiff sued out this writ of error.

Mr. Justice BREWER delivered the opinion of the Court.

The first contention of the defendant is that the Circuit Court did not have jurisdiction. The parties, it is true, were both citizens of Virginia, but the question presented in the declaration was the constitutionality of an act of Congress. The plaintiff's right of recovery was rested upon the unconstitutionality of the act, and that was the vital question. The Circuit Courts of the United States "have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States." (25 Stat. 433.)

That a case arises under the Constitution of the United States when the right of either party depends on the validity of an act of Congress, is clear. It was said by Chief Justice Marshall that "a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either," (*Cohens* v. *Virginia*, 6 Wheat. 264, 379;) and again, when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." (*Osborn* v. *Bank of the United States*, 9 Wheat. 738, 822.) See also *Gold-Washing & Water Company* v. *Keyes*, (96 U. S. 199, 201;) *Tennessee* v. *Davis*, (100 U. S. 257;) *White* v. *Greenhow, Treasurer*, (114 U. S. 307;) *Railroad Company* v. *Mississippi*, (102 U. S. 135, 139.) In the latter case

the following statement of the controversy was given in the opinion: "From this analysis of the pleadings, and of the petition for removal it will be observed that the contention of the State rests in part upon the ground that the construction and maintenance of the bridge in question is in violation of the condition on which Mississippi was admitted into the Union, and inconsistent with the engagement, on the part of the United States, as expressed in the act of March 1, 1817. On the other hand, the railroad company, in support of its right to construct and maintain the present bridge across Pearl River, invokes the protection of the act of Congress passed March 2, 1868." And upon these facts it was held that the case was rightfully removed to the Federal court. Within these decisions obviously the Circuit Court had jurisdiction.

A second contention of the defendant is this: After the case had been brought to this court the defendant, J. D. Brady, died. Whereupon the plaintiff took steps to revive the action, and on November 4, 1901, Maggie A. Brady, the executrix of the deceased, was substituted as party defendant. Now it is insisted that the action was one based upon a tort, and, as such, abated by reason of the death of defendant.

Congress has not, speaking generally, attempted to prescribe the causes which survive the death of either party. Section 955, Rev. Stat., provides that —

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

This does not define the causes which survive. In the absence of some special legislation the question in each case must be settled by the common law or the law of the State in which the cause of action arose. (*United States* v. *Daniel*, 6 How. 11; *Henshaw* v. *Miller*, 17 How. 212; *Schreiber* v. *Sharpless*, 110 U. S. 76; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673; *Baltimore & Ohio Railroad Company* v. *Joy*, 173 U. S. 226 229.) It matters not whether we consider the common law or the statute law of Virginia as controlling. By either the cause of action stated in the complaint survived the death of defendant.

Section 2655 of the Code of Virginia (Code of 1887) reads as follows:

"An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of or damage to any estate of or by his decedent."

The term "goods" is broad enough to include money, and as used in this statute must be held to be so inclusive, for it would be strange that a cause of action for taking and carrying away a thousand pieces of silver,

should survive the death of the defendant, while a like action for taking and carrying away a thousand dollars in money should not. In *The Elizabeth and Jane*, (2 Mason, 407, 408,) Mr. Justice Story said: "It cannot be doubted that money, and, of course, foreign coin, falls within the description of goods at common law." But more than that, the estate of plaintiff was reduced to the amount of three thousand dollars and over, by the action of decedent, and such reduction was a direct damage and comes within the rule laid down by the Court of Appeals in *Mumpower* v. *City of Bristol*, (94 Va. 737, 739,) in which the court held that: "The damages allowed to be recovered by or against a personal representative by section 2655 of the code are direct damages to property, and not those which are merely consequent upon a wrongful act to the person only," and in which the presiding judge of the court, delivering the opinion and showing that the act sued for was not within the scope of the statute, said:

"The wrongful act which the defendant is alleged to have committed and for the injury resulting from which the plaintiff sues, consisted in maliciously and without probable cause suing out an injunction against the plaintiff, whereby the operation of his mill was suspended. It is quite obvious that this injunction did not operate to take or carry away the goods of the plaintiff, nor cause the waste or destruction of, or inflict any damage upon, the estate of the plaintiff. It is true that the language of the statute is comprehensive, and embraces damage of any kind or degree to the estate, real or personal, of the person aggrieved; but the damage must be direct, and not the consequential injury or loss to the estate which flows from a wrongful act directly affecting the person only. No part of the defendant's property was taken or carried away; no part of it was wasted or destroyed. The plaintiff's use of his property, and not the property itself, was affected by the act of which he complains."

See also *Ferrill* v. *Brewis' Adm'r*, (25 Gratt. 765, 770,) and *Lee's Adm'r* v. *Hill*, (87 Va. 497.)

If we turn to the common law, there the rule was that if a party increased his own estate by wrongfully taking another's property an action against him would survive his death, and might be revived against his personal representative. In the case of *United States* v. *Daniel*, (6 How. 11,) which was an action against one who had in his lifetime been marshal of a district, to recover damages which the plaintiffs had sustained by reason of false returns made on certain executions by one of defendant's deputies, it was held that the action did not survive, because the decedent had received no benefit and had not increased his estate by means of the wrongful act. The court, referring to the common law, said:

"If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. . . . If the deputy marshal, in the misfeasance complained of, received

money or property, the marshal being responsible for such acts, the cause of action survived against his executors. But this is not the case made in the present action."

Now the gravamen of the plaintiff's complaint is that he was compelled to pay to the defendant the sum of $3,062.28 to protect his property from unlawful seizure for illegal taxes. In such cases, having paid under protest, he can recover in an action of assumpsit the amount thus wrongfully taken from him.

"Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of assumpsit for money had and received. Where the party voluntarily pays the money he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received." (*City of Philadelphia* v. *The Collector*, 5 Wall. 720, 731.) See also *Dooley* v. *United States*, (182 U. S. 222.)

It is true there are one or two sentences in the declaration appropriate to an action sounding in tort, such as the one last quoted, in which the pleader alleges that "by all of which acts and doings the plaintiff is damaged $6,000, and therefore he sues." But nevertheless the substance of the charge is that the defendant wrongfully took from plaintiff the sum of $3,062.28. By virtue thereof there was an implied promise on the part of the defendant to repay the same, and that implied promise lies at the foundation of the action.

In *Schreiber* v. *Sharpless*, (110 U. S. 76, 80,) it was said:

"The right to proceed against the representatives of a deceased person depends not on forms and modes of proceedings in a suit, but on the nature of the cause of action for which the suit is brought. . . . Whether an action survives depends on the substance of the cause of action, not on the forms of proceedings to enforce it."

And in *Lee's Adm'r* v. *Hill*, *supra*, the court observed (p. 500):

"The true test is, not so much the form of the action, as the nature of the cause of action. Where the latter is a *tort* unconnected with contract, and which affects the person only, and not the estate, such as assault, libel, slander and the like, there the rule *actio personalis*, &c., applies. But where, as in the present case, the action is founded on a contract, it is virtually *ex contractu*, although nominally in *tort*, and there it survives."

And also quoted the following from *Booth* v. *Northrop*, (27 Conn. 325:)

"In determining whether a cause of action survives to the personal representative, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced."

For these reasons, and under these authorities, we are of opinion that this cause of action survived the death of the defendant, and was rightfully revived in the name of his executrix.

We pass, therefore, to consider the merits of the case, and here the first question is, what is the nature of the tax? Obviously it was intended by Congress as an excise.

In the chapter in the Revised Statutes on internal revenue, section 3368, it was provided that "upon tobacco and snuff manufactured and sold, or removed for consumption or use, there shall be levied and collected the following taxes:" Then followed statements of the amounts of the prescribed taxes. Section 30 of the Tariff Act of 1890 (26 Stat. 619) reads:

"That on and after the first day of January, eighteen hundred and ninety-one, the internal taxes on smoking and manufactured tobacco shall be six cents per pound, and on snuff six cents per pound."

On June 13, 1898, Congress passed an act to provide ways and means to meet the expenditures of the Spanish-American War (30 Stat. 448.) Section 3, so far as is applicable, is as follows:

"SEC. 3. That there shall, in lieu of the tax now imposed by law, be levied and collected a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, or removed for consumption or sale. . . .

"And there shall also be assessed and collected, with the exceptions hereinafter in this section provided for, upon all the articles enumerated in this section which were manufactured, imported and removed from factory or customhouse before the passage of this act bearing tax stamps affixed to such articles for the payment of the taxes thereon, and canceled subsequent to April fourteenth, eighteen hundred and ninety-eight, and which articles were at the time of the passage of this act held and intended for sale by any person, a tax equal to one-half the difference between the tax already paid on such articles at the time of removal from the factory or customhouse and the tax levied in this act upon such articles.

"Every person having on the day succeeding the date of the passage of this act any of the above-described articles on hand for sale in excess of one thousand pounds of manufactured tobacco and twenty thousand cigars or cigarettes, and which have been removed from the factory where produced or the customhouse through which imported, bearing the rate of tax payable thereon at the time of such removal, shall make a full and true return, under oath, in duplicate, of the quantity thereof, in pounds as to the tobacco and snuff and in thousands as to the cigars and cigarettes so held on that day, in such form and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. . . ."

Ever since the early part of the civil war there has been a body of legislation, gathered in the statutes under the title Internal Revenue, by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation, but are among its comforts and luxuries. The

first of these acts, passed on July 1, 1862, (12 Stat. 432,) in terms provided for "the collection of internal duties, stamp duties, licenses or taxes imposed by this act," and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the act of 1890 reducing it to six cents a pound. Then came the act in question, which, for the purpose of providing means for the expenditures of the Spanish war, increased the charge to 12 cents a pound, specifying distinctly that it was to be "in lieu of the tax now imposed by law." *Nothing can be clearer than that in these various statutes, the last* included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, &c. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term.

Turning to Blackstone, vol. 1, p. 318, we find an excise defined: "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." This definition is accepted by Story in his Constitution of the United States, sec. 953. Cooley in his work on Taxation, page 3, defines it as "an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." Bouvier and Black, respectively, in their dictionaries give the same definition. If we turn to the general dictionaries, Webster's International calls it "an inland duty or impost operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, &c., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities." The definition in the Century Dictionary is substantially the same, though in addition this is quoted from Andrews on Rev. Law, sec. 133: "Excises is a word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it."

Some of these definitions were quoted with approval by this court in the Income Tax cases, and while the phraseology is not the same in all, yet so far as the particular tax before us is concerned, each of them would include it. The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article.

It is practically conceded by one counsel for plaintiff in error that this is an excise tax. After discussing the question at some length he says:

"To determine then what excise means we have for our guidance, first, an enumeration of the articles that it fell on in Great Britain in 1787. We have, second, the nature of the tax as judicially determined; and we have,

third, the definition of it, or the common understanding of men about it, as given by the Encyclopedia Britannica and the Century Dictionary. Taking these three sources of information and combining them, it would seem that the leading idea of excise is that it is a tax, laid without rule or principle, upon consumable articles, upon the process of their manufacture and upon licenses to sell them. . . . Since tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed, I shall assume that the court will hold that the tax in this case is an excise."

It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the Income Tax cases, but, as we have seen, it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use. It may be, as Dr. Johnson said, "a hateful tax levied upon commodities;" an opinion evidently shared by Blackstone, who says, after mentioning a number of articles that had been added to the list of those excised, "a list which no friend to his country would wish to see further increased." But these are simply considerations of policy and to be determined by the legislative branch, and not of power, to be determined by the judiciary. We conclude, therefore, that the tax which is levied by this tax is an excise, properly so called, and we proceed to consider the further propositions presented by counsel.

It is insisted: "That Congress may excise an article as it pleases so that the excise does not amount to spoilation or confiscation. But that having excised it, it has excised it, and the power is exhausted. It cannot excise a second time." But why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the government has ceased. They are, as said in Cooley on Taxation, p. 1: "The enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government and for all public needs," and so long as there exists public needs just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order "to provide for the common defense" and "promote the general welfare." Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be, that having made provision for times of peace and quiet, the government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies.

That which was possible in fact existed. A war had been declared. National expenditures would naturally increase and did increase by reason thereof. Provision by way of loan or taxation for such increased expenditures was necessary. There is in this legislation, if ever such a question could arise, no matter of color or pretence. There was an existing demand, and to meet that demand this statute was enacted. The question, therefore, is whether Congressional provision must reach through an entire year and at the beginning finally determine the extent of the burden of taxes which can be cast upon the citizen during that year, with the result that if exigencies arise during the year calling for extraordinary and unexpected expenses the burden thereof must be provided for by way of loan, temporary or permanent; or whether there inheres in Congress the power to increase taxation during the year if exigencies demand increased expenditures. On this question we can have no doubt. Taxation may run *pari passu* with expenditure. The constituted authorities may rightfully make one equal the other. The fact that action has been taken with regard to conditions of peace does not prevent subsequent action with reference to unexpected demands of war. Courts may not in this respect revise the action of Congress. That body determines the question of war, and it may therefore rightfully prescribe the means necessary for carrying on that war. Loan or tax is possible. It may adopt either, or divide between the two. If it determines in whole or in part on tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge. Wisely was it said by Mr. Justice Cooley in his work on Taxation, page 34:

"'The legislative makes, the executive executes, and the judiciary construes the laws.' (Chief Justice Marshall, in *Wayman* v. *Southard*, 10 Wheat. 1, 46.) The legislature must therefore determine all questions of State necessity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. 'The judicial tribunals of the State have no concern with the policy of legislation. That is a matter resting altogether in the discretion of another co-ordinate branch of the government. The judicial power cannot legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the State.' (Chief Justice Redfield, in *In re Powers*, 25 Vt. 261, 265.) . . . But so long as the legislation is not colorable merely, but is confined to the enactment of what is in its nature strictly a tax law, and so long as none of the constitutional rights of the citizen are violated in the directions prescribed for enforcing the tax, the legislation is of supreme authority. Taxes may be and often are oppressive to the persons and corporations taxed; they may appear to the judicial mind unjust and even unnecessary, but this can constitute no reason for judicial interference."

In a general way these observations on the power of Congress to meet exigencies by increased taxation are not questioned by counsel, but it is specifically insisted that the power of imposing an excise once exercised is gone, even though the property may thereafter remain subject to ordinary taxation upon property as such. We quote the language of counsel:

"Possibly the property is not therefore to go free of taxation thereafter because it has been excised. If a man who has paid an excise upon a thousand boxes of tobacco chooses to stack it up in a warehouse and keep it there ten years, the tobacco is not, possibly, to go tax free because it has borne an excise. It receives the protection of the laws, and it should bear its part of the burdens of the laws. But it is to be taxed thereafter according to the principles of taxation, and not according to the arbitrariness of excise. Taxation upon it thereafter is to be direct taxation imposed according to population, which makes it bear a burden that is proportional to that borne by other property."

Doubtless a general tax may be cast upon property once charged with an excise; and the power to tax it as property, subject to constitutional limitations as to the mode of taxing property, might not be defeated by the fact that it has already paid an excise. But what is the difference in the nature of an excise and an ordinary property tax which forbids a repetition or increase in the one case and permits it in the other? They are each methods by which the individual is made to contribute out of his property to the support of the government, and if an ordinary property tax may be repeated or increased when the exigencies of the government may demand, no reason is perceived why an excise should not also be repeated or increased under like exigencies. Counsel speaks of the power to impose an excise as an arbitrary, unrestrained power, but the Constitution, art. 1, sec. 8, provides that "all duties, imposts and excises shall be uniform throughout the United States." The exercise of the power is, therefore, limited by the rule of uniformity. The framers of the Constitution, the people who adopted it, thought that limitation sufficient, and courts may not add thereto. That uniformity has been adjudged to be a geographical uniformity. In the *Head-Money Cases*, (112 U. S. 580, 594,) it was said:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform, and operates precisely alike in every port of the United States where such passengers can be landed. . . . Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (*State Railroad Tax cases*, 92 U. S. 575, 612.) Here there is substantial uniformity within the meaning and purpose of the Constitution."

So also in the recent case of *Knowlton* v. *Moore*, (178 U. S. 41, 106):

"By the result, then, of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity. And it also results that the assertion to which we at the outset referred, that the decision in the *Head-Money cases*, holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated as respected their operation, as one and the same thing, and embodied the same conception."

Geographical uniformity being therefore that only which is prescribed by the Constitution the courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount, or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final.

Neither can it be said that the change in the ownership of the tobacco in the case at bar had placed it beyond the reach of an excise. It is true that it had passed from the manufacturer, but it had not reached the consumer. By section 3 of the statute the charge is placed upon articles which "were at the time of the passage of this act held and intended for sale," and this tobacco was purchased and held for sale by the plaintiff. Within the scope of the various definitions we have quoted there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer.

Our conclusion, then, is that it is within the power of Congress to increase an excise as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; that it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount, or the property upon which it is imposed.

The act in controversy, so far as the charge upon this plaintiff is concerned, is constitutional; and the judgment of the Circuit Court is

Affirmed.

Mr. Justice HARLAN and Mr. Justice GRAY took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.